Form No. 7 . B[illegible]C

San Francisco
Law Library
No.....

Presented by

.....

EXTRACT FROM BY-LAWS

Section 9. No book shall, at any time, be taken from the Library Room to any other place than to some court room of a Court of Record, State or Federal, in the City of San Francisco, or to the Chambers of a Judge of such Court of Record, and then only upon the accountable receipt of some person entitled to the use of the Library. Every such book so taken from the Library, shall be returned on the same day, and in default of such return the party taking the same shall be suspended from all use and privileges of the Library until the return of the book or full compensation is made therefor to the satisfaction of the Trustees.

Sec. 11. No books shall have the leaves folded down, or be marked, dog-eared, or otherwise soiled, defaced or injured. Any party violating this provision, shall be liable to pay a sum not exceeding the value of the book, or to replace the volume by a new one, at the discretion of the Trustees or Executive Committee, and shall be liable to be suspended from all use of the Library till any order of the Trustees or Executive Committee in the premises shall be fully complied with to the satisfaction of such Trustees or Executive Committee.


Digitized by the Internet Archive
in 2010 with funding from
Public.Resource.Org and Law.Gov

http://www.archive.org/details/govuscourtsca9briefs1031

031

No. 2822

United States

Circuit Court of Appeals

For the Ninth Circuit.

JOHN H. MARTIN, as Trustee in Bankruptcy of the IMPERIAL COPPER COMPANY, a Corporation, Bankrupt,

Appellant,

vs.

THE DEVELOPMENT COMPANY OF AMERICA, a Corporation,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the District of Arizona.

F. D. Monckton, Clerk.
JUL 10 1916
Filed

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

No. 2822

United States

Circuit Court of Appeals

For the Ninth Circuit.

JOHN H. MARTIN, as Trustee in Bankruptcy of the IMPERIAL COPPER COMPANY, a Corporation, Bankrupt,

Appellant,

vs.

THE DEVELOPMENT COMPANY OF AMERICA, a Corporation,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the District of Arizona.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	Page
Assignment of Errors	43
Attorneys of Record, Names and Addresses of	1
Certificate of Clerk United States District Court to Transcript of Record	46
Complaint	1
Judgment	38
Minute Order Made on June 14, 1916	41
Motion to Dismiss Complaint and Answer	22
Names and Addresses of Attorneys of Record	1
Order Allowing Appeal, etc.	42
Petition for Appeal	40
Plaintiff's Assignment of Errors	43
Praecipe for Transcript of Record	45

Names and Addresses of Attorneys of Record.

FRANCIS M. HARTMAN, EDWIN F. JONES,
Tucson, Arizona,
Counsel for Appellant.

SELIM M. FRANKLIN, Tucson, Arizona,
ELLINWOOD & ROSS, Bisbee, Arizona,
Counsel for Appellee. [1*]

In the United States District Court for the District of Arizona.

IN EQUITY—E–27 (TUCSON).

JOHN H. MARTIN, Trustee in Bankruptcy of the IMPERIAL COPPER COMPANY, a Corporation,

Plaintiff,

vs.

THE DEVELOPMENT COMPANY OF AMERICA, a Corporation,

Defendant.

Complaint.

To the Honorable Judge of the District Court of the United States for the District of Arizona:

John H. Martin, Trustee in Bankruptcy of the Imperial Copper Company, a corporation, bankrupt, a citizen of the State of Arizona, and a resident of Pima County in said State, brings this his Bill against The Development Company of America, a corporation, organized, created by and existing under and by virtue of the laws of the State of Dela-

*Page-number appearing at foot of page of original certified Record.

ware, and owning property, conducting and transacting business and having an agent within the State of Arizona.

And for this cause of action plaintiff states:

I.

That plaintiff is now and has been since on or about July 2, 1914, the duly elected, qualified and acting Trustee in Bankruptcy of the Imperial Copper Company, a corporation, bankrupt, and is a citizen of the State of Arizona, and a resident of Pima County, in said State; and that the defendant, The Development Company of America, during all the times mentioned herein, was and is a corporation organized, created by and existing under and by virtue of the laws of the State of Delaware, and owning property, conducting and transacting business and having an agent within the State of Arizona.

II.

That this suit is between citizens of different States, and is a matter or proceeding in bankruptcy. That the amount in [2] controversy herein exceeds the sum of Three Thousand Dollars ($3,000.00), exclusive of interest and costs.

III.

That the defendant, during all the times mentioned herein, was and is now engaged in the business of purchasing, developing and operating mining and smelting properties, and the building and operating of railroads in the State of Arizona.

IV.

That the said defendant, heretofore, in the year 1903, acquired, owned and held a certain contract

for the purchase of certain mining properties situate at Silver Bell, Pima County, Arizona, and being those certain mining properties hereinafter more particularly described, for the price and sum of Five Hundred and Fifteen Thousand Dollars ($515,000.00), and that thereafter on or about May 11, 1903, defendant created and caused the said Imperial Copper Company, a corporation, to be organized under the laws of Arizona, for the purpose of consummating, carrying out and carrying into effect, the said contract of purchase, for the use and benefit of defendant, and for the purpose of purchasing, developing and operating said mining properties, for the use and benefit of defendant, and in the furtherance of the said business of the said defendant, and for the purpose of carrying on and conducting the business of the said defendant, for its use and benefit, in which it was so engaged as aforesaid. [3]

V.

That all of the incorporators, directors and officers of the said Copper Company were at all times employees of the said Development Company.

That the said Development Company, at all the times herein mentioned, and up until on or about March 31, 1915, owned and controlled practically all of the shares of the capital stock of the said Copper Company; and from the date of the organization of the said Copper Company and up until some time in 1911, when the said Copper Company was adjudicated a bankrupt, as hereinafter set forth, elected all of the directors, officers and managers of the said Copper Company, from its own employees, directors

and officers; and controlled, directed, handled and transacted all the business of the said Copper Company, as a department or bureau of the business of the said Development Company; and collected, received, handled and used all of the moneys and proceeds derived from the operation of the said mining properties, and all the profits thereof, and appropriated the same to its own use, in its business of purchasing, developing and operating mining and smelting properties as aforesaid.

VI.

That the said Development Company caused the title to the said mining properties so situate at Silver Bell, Pima County, Arizona, to be taken in the name of the said Copper Company, and caused the said mining properties to be developed and operated in the name of the said Copper Company, and for the use and benefit of the said Development Company; and that the title to the said properties was so taken in the name of the said Copper Company and the said properties so operated in the name of the said Copper Company, as a convenience to the said Development Company, and to facilitate the said business of the said Development Company of purchasing, developing and operating mining and smelting properties. [4]

VII.

That F. M. Murphy, a resident of the County of Yavapai, State of Arizona, is now, and during all the times mentioned herein was, the President and chief officer of the said Development Company, and is now, and has been since November 9, 1909, the President

and chief officer of the said Copper Company.

That the Board of Directors of the said Copper Company was composed of seven persons, to wit: F. M. Murphy, E. B. Gage, H. M. Robinson, Selwyn Eddy, V. L. Mason, W. F. Staunton and A. N. Gage; and that the said F. M. Murphy, E. B. Gage, H. M. Robinson, Selwyn Eddy and V. L. Mason, were, at the same time, directors in the said Development Company.

That the Executive Committees of the said Development Company and the said Copper Company were composed of practically the same individuals, in this, to wit, that the Executive Committee of the said Development Company was composed of F. M. Murphy, E. B. Gage, H. M. Robinson, V. L. Mason and B. P. Cheyney; and that the Executive Committee of the said Copper Company was composed of F. M. Murphy, E. B. Gage, H. M. Robinson, V. L. Mason and W. F. Staunton.

VIII.

That the said Development Company so created the said Copper Company and used the same as an auxiliary, subsidiary, branch, agent and instrumentality, in conducting and carrying on its said business of purchasing, developing and operating mining and smelting properties.

IX.

That the said Development Company in 1903, caused the said Copper Company to execute a first mortgage or deed of trust upon all of said mining properties to secure a bond issue in the sum of Two Million Dollars ($2,000,000), for the use and benefit

of the said Development Company, and that all of said bonds were issued and delivered to the said Development Company, and that the said Development Company used all of said bonds and the [5] proceeds of the sale thereof in its business of purchasing, developing and operating mining and smelting properties: and that the said Development Company also used all the capital stock of the said Copper Company, of the par value of Five Million Dollars ($5,000,000), and the proceeds of the sale thereof, in its said business of purchasing, developing and operating mining and smelting properties in Arizona.

X.

That the said Development Company, in furtherance of its said business of purchasing, developing and operating mining and smelting properties, in Arizona, and especially those certain mining and smelting properties situated in Pima and Pinal Counties, Arizona, hereinafter referred to, and for the purpose of carrying on and engaging in its said business in Arizona, also, some time in 1903 and 1904, created two certain other dummy corporations under the laws of Arizona, to wit, the Arizona Southern Railroad Company and the Southern Arizona Smelting Company, and elected all the directors, officers and managers of said dummy corporations, and at all times controlled and managed the affairs and business of both of such dummy corporations, as bureaus or departments of its said business; and caused all the shares of the capital stock of said two corporations to be issued to and to be held in the

name of the said Copper Company; and thereafter, in 1904, the said Development Company caused all the shares of the capital stock of the said Railroad Company and of the said Smelting Company to become subject to the lien of the said mortgage or deed of trust, as additional collateral security for the said issue of bonds in the sum of Two Million Dollars, so theretofore issued and delivered to the said Development Company. [6]

XI.

That the mining properties so purchased, developed and operated by the said Development Company, through the said Imperial Copper Company, the said Arizona Southern Railroad Company and the said Southern Arizona Southern Smelting Company, and so covered by the said mortgage or deed of trust, are situate in the Silver Bell Mining District, Pima County, Arizona, and in Pinal County, Arizona, and are more particularly described as follows, to wit:

United States Patented Mines:	Patent Recorded in Recorder's Office Pima County, in Records Deeds of Real Estate:	
Mammoth Copper	Book 24 Deeds Mines	page 236
Imperial	24	215
Prospector	24	231
Southern Beauty	24	215
Comet	24	215
Herbert	24	223
Page	24	215
Kankee	24	229
Confidence	24	226

United States Patented Mines:	Patent Recorded in Recorder's Office Pima County, in Records Deeds of Real Estate:	
Bell and Pope	24	233
Alliance, Northern & Enterprise	24	220
Union	24	215
Murray & Mollie (excepting certain portions of said Mollie & Murray)	26	251
Emerald	24	553
Hamilton	24	533
Florence	24	527
Black Daisy	24	533
Apache, Papago, Omaha, Baltimore, Swansea, and Detroit	24	262
Sampson	24	337
Hilda	26	259
Black Eagle	25	721
John F.	25	721
Leslie (Excepting certain portion of said Leslie)	24	426
Maggie	24	527
Spike	24	527
Billy	25	721
Frank B.	26	259
Wedge	25	721
Strip	25	721
Fraction	24	310
Wedge	24	310

United States Patented Mines:	Patent Recorded in Recorder's Office Pima County, in Records Deeds of Real Estate:	
Percy	24	424
Midget	24	474
Mountain View	24	267
Protection, Chance, Long-shot and Remnant	25	484
Peerless	25	509

[7]

United States Patented Mines, Continued:

Prince of Wales (excepting portion of same)	Book 25	page 504
Red Ridge	25	729

Unpatented Lode Mining Claims:	Location Notices Recorded in Recorder's Office, Pima County, Arizona, in Records of Mines:	
Olympia	Book GG	page 682
Queen	HH	225
Accident	GG	53
Anita	GG	335
Millionaire	GG	582
Trudie	GG	681
El Paso	GG	583
Pima	OO	448
Giant	I I	755
Bonzana	OO	438
Blue Hill	OO	439
Campo	OO	439
Caliche	OO	440
Cholla	OO	442
Palo Verde	OO	443
Sahura	OO	444
Sure Thing	OO	445

Unpatented Lode Mining Claims:	Location Notices Recorded in Recorder's Office, Pima County, Arizona, in Records of Mines:	
Tuna	OO	446
West End	OO	447
Taft	OO	449
North Slope	OO	450
Wye	OO	493
Copperosity	LL	555
Sentipede, No. 2	MM	251
Oversight	NN	513
Andesite	NN	395
Aplite	NN	396
Dlabase	NN	397
Diorite	NN	398
Granite	NN	399
Monzonite	NN	401
Dacite	NN	402
Phonolite	NN	402
Syenite	NN	403
Trachyte	NN	403
Porphyry	NN	405
Basalt	NN	406
Pegmatite	NN	407
Rhyolite	NN	408

Also the buildings, plan, fixtures, machinery and appliances situate upon or annexed or appurtenant to the above-described property, and used in connection therewith.

Also those certain pieces and parcels of real estate situate in Pima County, Arizona, in Township Eleven South, Range Eleven East, namely: Lots One (1), Two (2), Three (3) and Four (4) of Sec-

tion Six (6); the North Half (½) of the Northeast Quarter; and the Southeast Quarter of the Northeast Quarter of Section Seven (7); the Northwest Quarter, and the North Half of the Southwest Quarter, and the Northwest Quarter of the Southeast Quarter of Section Eight (8), containing approximately 642 acres. [8]

Also the following described lots, pieces or parcels of real estate situate in the County of Pinal, Arizona, to wit:

The North half (½); the North half (½) of the Southwest quarter and the Southeast quarter of Section Eight (8); the West half (½) of the Southwest quarter of Section ten (10); all of Section Nine (9) and about Twenty (20) acres out of the Southwest quarter of Section Four (4) in Township Ten (10) South, Range ten (10) East, G. & S. R. B. & M., subject to a certain right of way.

That the shares of stock hereinbefore referred to as having been made subject to the lien of said mortgage by the said Development Company, are described as follows, to wit:

Eight Thousand (8,000) shares of the capital stock of the Arizona Southern Railroad Company, an Arizona corporation; and Nine Thousand (9,000) shares of the capital stock of the Southern Arizona Smelting Company, an Arizona corporation.

XII.

Plaintiff is informed and believes, and upon such information and belief alleges, that on July 3, 1911, the said Development Company being then and there the owner and holder of and controlling a majority

of said bonds and the said shares of stock of the said Copper Company, caused a suit to be instituted in the then District Court of the First Judicial District of the Territory of Arizona, in and for Pima County, to foreclose said mortgage or deed of trust on all of said mining properties, and on said shares of stock of said Railroad Company and said Smelting Company, and thereafter on December 28, 1914, obtained a decree of foreclosure of said mortgage or deed of trust, by the Superior Court of the State of Arizona, in and for the County of Pima, the successor of said last above-named court, and an order of sale of all of said mining properties, and of said shares of stock; and thereafter on March 31, 1915, the said Development Company caused all of said mining properties and said shares of stock to be sold under such foreclosure, and caused the said mining properties to be bid in at such sale, in the name of Leo Goldschmidt of Tucson, Pima County, Arizona, at the price of [9] Ninety Thousand Dollars ($90,000) and the said shares of stock of the said Railroad Company and said Smelting Company at the price of Twelve Thousand Dollars ($12,000), for the use and benefit of the said Development Company, or for the use and benefit of the said F. M. Murphy, the President and chief officer of the said Development Company, and as representing the stockholders and bondholders of the said Development Company; and that the said Development Company and the said Murphy, as the real parties in interest in said purchase at such foreclosure sale, are now negotiating for the sale of all of said mining properties

and said shares of stock of said Railroad Company and said Smelting Company, and have made and entered into some character of agreement with the American Smelting & Refining Company, a corporation organized under the laws of New Jersey, and transacting business in Pima County, Arizona, for the sale to the said American Smelting & Refining Company, of all of said mining properties and said shares of stock, and that the said Smelting & Refining Company is now in possession of said mining properties and working upon the same.

XIII.

That on July 5, 1911, a petition in bankruptcy was filed against the said Copper Company, in the then District Court of the First Judicial District of the Territory of Arizona, by certain creditors, and thereafter on July 25, 1911, said Copper Company was duly adjudged bankrupt; and that thereafter and prior to the first meeting of the creditors on August 12, 1911, the following claims were filed in said bankruptcy proceeding:

Haas, Baruch & Co., for merchandise	.....	$9,478.39
Pacific Hardware & Steel Co.	"	1,053.38
Bishop & Co.,	"	573.68
J. F. Lucy & Co.,	"	280.99
Levi Strauss & Co.,	"	482.46
A. Schilling & Co.,	"	1,103.68
Associated Oil Co.,	"	3,280.74
Lamar Milling Co.,	"	901.80

[10]

Dupont Powder Co.,	"	15,109.41
Pabst Brewing Co.,	"	1,878.75

San Pedro Lumber Co., " 3,638.80
El Paso Foundry & Machine Co., merchandise 552.55
Home Pattern Co., merchandise..... 70.15
Brownstein, Lewis & Co., " 984.81
Wheeler & Motter Mercantile Co., merchandise 2,924.48

$42,296.07

That the following claims so filed were controlled by the said Development Company, and by the said F. M. Murphy, as the President and Chief Officer of said Development Company:

Southern Arizona B. & T. Co.....$ 5,000.00
Sullivan Machinery Co..... 878.16
Elfred J. Peters & Co..... 590.46
Ben Goodrich 600.00
Star Drilling Machine Co..... 987.70
Meade Goodloe 523.72
E. K. Wood Lumber Co..... 7,457.84
Standard Oil Co..... 4,347.90
Houch & Deiter.....1,137.33
Cons. Lumber Co..... 14,714.28
Pacific Lumber Co..... 14,499.53
Cons. National Bank..... 10,000.00
W. K. Flora..... 240.35
Marshall Field & Co..... 1,837.61

$105,110.95

Development Company of America.....$ 39,423.02

(Which said claim as appears from the proof of debt so filed by the Development

Co., is on a note dated May 1, 1911, payable on demand, to the Development Co., executed by the Copper Company, for $25,000.00, and for balance on open account of dealings between said bankrupt and said creditor and on account of arrears OF INTEREST ACCRUING UPON BONDS of said bankrupt held and owned by said Development Company.)

Empire Trust Company of New York. . . .$238,000.00

(Which said claim, as appears from the proof of debt so filed by said Empire Trust Company, is founded upon eight promissory notes executed by the Copper Company payable to the Development Company, two of which said notes for $50,000.00 each were executed by the said F. M. Murphy as President of the Copper Company, and at the same time President of the said Development Company.) **[11]**

National Park Bank of New York. $161,704.15

(Which said claim, as appears from the proof of debt so filed by said National Park Bank, to be founded upon five promissory notes executed by the Copper Company, payable to the Development Company.)

Thomas W. Joyce, of New York. $725,966.43

(Which said claim, as appears from the proof of debt so filed by the said Joyce, is founded upon fifteen promissory notes, fourteen for $50,000.00 each and one for

$25,000.00, all dated April 1, 1910, executed by the Copper Company, payable on demand to the said Development Company.)

Philbin, Beekman, Menken & Griscom. . .$10,661.67

(Which said claim, as appears from the proof of debt thereof so filed, is founded upon a promissory note dated June 16, 1910, executed by the Imperial Copper Company, by F. M. MURPHY, President, who was at the same time President of the said Development Company, payable on demand to the said Development Company of America.)

El Tiro Copper Company (not yet allowed) .....$ 3,196.99

Arizona Southern R. R. Co. (not yet allowed) $14,440.14

Total of claims filed.....$1,298,323.35

That all of the above-mentioned claims have been allowed by the Referee in Bankruptcy of said proceeding, excepting the claims of El Tiro Copper Company and the Arizona Southern R. R. Co., making a total of claims allowed in said bankruptcy proceeding, of the sum of.....$1,280,686.22

XIV.

That at the first meeting of the creditors in said bankruptcy proceedings on or about August 12, 1911,

M. P. Freeman was elected Trustee, and acted as such until on or about July 2, 1914, at which time he resigned and plaintiff was duly elected and qualified as such Trustee.

XV.

Plaintiff is informed and believes, and upon such information and belief alleges, that there was some character of [12] agreement between the said Development Company and the said Murphy, as the President and chief officer thereof, and the creditors of said estate, that said bankruptcy proceedings should lie dormant, and that the said Development Company and the said Murphy should be allowed time within which to re-finance and rehabilitate said mining properties to enable the said Development Company and the said Murphy to raise sufficient funds with which to liquidate and pay off and discharge said debts; and that in pursuance of said agreement, and relying upon the representations and promises so made by the said Development Company and the said Murphy, the said creditors did allow said bankruptcy proceedings to lie dormant, up until some time in 1914, and until the election and qualification of plaintiff herein as such Trustee; and "that any seeming delay in the institution of this action was caused by the said Development Company and the said Murphy themselves; and plaintiff further alleges that he is informed and believes and upon such information and belief alleges, that the said Development Company and the said Murphy controlled the said bankruptcy proceedings during all of said time and up until plaintiff herein

was elected and qualified as such trustee.

XVI.

That the action of the said Development Company in causing all the said mining properties and the said shares of stock in the said Railroad Company and said Smelting Company to be so sold under said foreclosure proceeding, resulted in stripping the said Copper Company of practically all of its assets, with the exception of some personal property situated at said mines, which said personal property plaintiff as such Trustee caused to be advertised for sale at public auction, after due and legal notice, and that the only bid received therefor was a bid in the sum of Five Hundred Dollars ($500.00) made by Geo. W. Dietz of **[13]** Tucson, Pima County, Arizona, and he has not been able to obtain any other bid for said personal property, at private sale, than the sum of Fourteen Hundred Dollars ($1400.00).

XVII.

That there has not been sufficient moneys or property come into the hands of plaintiff, as such trustee of said estate, with which to pay any dividends upon the claims so filed and allowed by the Referee in Bankruptcy in said proceeding, as herein before set forth.

XVIII.

That by reason of the matters and things herein set forth, plaintiff is advised and informed, and therefore alleges, that the said Development Company of America, the defendant herein, became and is liable for all of the debts of the said Copper Com-

pany, and as filed and allowed in said bankruptcy proceedings, amounting to the sum of One Million Two Hundred and Eighty Thousand Six Hundred and Eighty-six and 22/100 Dollars ($1,280,686.22), with interest thereon at the rate of six per cent per annum from the date of said allowance; and that all of the said mining properties and the said shares of stock of the said Railroad Company and of said Smelting Company, so purchased at such foreclosure sale by the said Development Company of America, or for its use and benefit, are liable for all of said debts.

Wherefore plaintiff prays:

1. That plaintiff have and recover judgment against the defendant, the said Development Company of America, for the said sum of One Million Two Hundred and Eighty Thousand Six Hundred and Eighty-Six and 22/100 Dollars ($1,280,686.22), the amount of the debts so filed and allowed in said bankruptcy proceedings, with interest at the rate of six per cent per annum from the date of such allowance. **[14]**

2. That plaintiff have Judgment decreeing that all of the said mining properties and the said shares of stock of said Railroad Company and said Smelting Company are liable for the claims of the creditors of said Copper Company, as filed and allowed in said bankruptcy proceeding.

3. That the claims of the said creditors of the said Copper Company be decreed and declared to be liens upon all the right, title or interest in and to said properties acquired by the said Development

Company under and by virtue of said foreclosure proceeding.

4. That all of the said mining properties and the said shares of stock be decreed to be a part of the assets of the said Imperial Copper Company, bankrupt; that the jurisdiction of plaintiff as Trustee of said Imperial Copper Company, bankrupt; be extended to the same and that the said properties be administered upon by plaintiff as such Trustee.

5. And for alternative relief; that the defendant, the said Development Company of America be required and ordered to pay over to plaintiff all sums of money derived or to be derived by it from any sale or sales of any of said properties, to the extent of the said indebtedness and claims so filed and allowed against the said Copper Company, bankrupt.

6. And for any other, further, special or general relief in the premises as to the Court may seem meet and proper, and for costs.

Answer under oath waived.

FRANCIS M. HARTMAN,
EDWIN F. JONES,
Attorneys for Plaintiff.

[15]

State of Arizona,
County of Pima,—ss.

Personally appeared before the undersigned authority, John H. Martin, Trustee in Bankruptcy of the Imperial Copper Company, a corporation, bankrupt, the plaintiff in the above-entitled action, who being duly sworn as to the truth of the allegations made in the above bill, says that he has read the

foregoing bill and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated on information and belief, and as to those matters he believes them to be true.

JOHN H. MARTIN.

Subscribed and sworn to before me this 23d day of August, A. D. 1915.

My com. Ex. July 29, 1916.

[Seal] TOM K. RICHEY,
Notary Public, Pima County, Arizona.

(20 cents in revenue stamps.)

[Endorsements]: E–27—Tucson. In the United States District Court for the District of Arizona. John H. Martin, Trustee of the Imperial Copper Company, a Corporation, Bankrupt, Plaintiff, vs. The Development Company of America, a Corporation, Defendant. In Equity. Plaintiff's Bill of Complaint. Filed Aug. 23, A. D. 1915, at 11:30 A. M. George W. Lewis, Clerk. By Geo. C. Pollock, Deputy Clerk. Francis M. Hartman, Attorney at Law, Tucson, Arizona. **[16]**

In the United States District Court, for the District of Arizona.

IN EQUITY—E-27. (TUCSON.)

JOHN H. MARTIN, Trustee of the IMPERIAL COPPER COMPANY, A Corporation, Bankrupt,

Plaintiff,

vs.

THE DEVELOPMENT COMPANY OF AMERICA, a Corporation,

Defendant.

Motion to Dismiss Complaint and Answer.

MOTION TO DISMISS FOR WANT OF JURISDICTION.

Now comes the Development Company of America, the defendant in the above-entitled action, and answering plaintiff's complaint alleges, as a separate defense, that at the commencement of this action this defendant was not, and is not, an inhabitant of nor residing in the District of Arizona, where this suit is brought, but that at the commencement of this action, and now, this defendant was and now is an inhabitant of and residing in the State of Delaware; that at the time of the commencement of this action this defendant was not, and has not since been, and is not now, engaged in the transaction of business within the State of Arizona; and therefore that this action is not properly within the jurisdic-

tion of this court, and defendant moves that the same be dismissed. [17]

MOTION TO DISMISS FOR WANT OF INSUFFICIENCY OF FACT TO CONSTITUTE A VALID CAUSE OF ACTION IN EQUITY.

And said defendant, without waiving its foregoing motion to dismiss for want of jurisdiction, but if the same be overruled, further answering the said bill of complaint, alleges, that the said bill of complaint upon its face discloses an insufficiency of fact to constitute a valid cause of action in equity; and that the plaintiff has not alleged in the said bill of complaint facts sufficient to constitute any valid cause of action in equity, in law or otherwise against this defendant, or any cause of action whatsoever.

Wherefore, defendant prays that said bill of complaint be dismissed.

PLEA IN BAR.

And said defendant, without waiving its said foregoing motion to dismiss for want of jurisdiction, but if the same be overruled, then further answering the bill of complaint, alleges, that plaintiff is barred and estopped to litigate the matters and things set forth in the said bill of complaint, by reason and by virtue of a certain judgment heretofore rendered and entered by the Superior Court of the State of Arizona, in and for the County of Pima, in which suit the said plaintiff was a party, and in this behalf, this defendant further avers:

1. That heretofore on or about the 3d day of

July, 1911, a certain action was instituted in the District Court of the First Judicial District of the Territory of Arizona, in and for the County of Pima, being the predecessor of said Superior Court of the State of Arizona, in and for the County of Pima, wherein Bankers Trust Company, a corporation, was [18] plaintiff, and the Imperial Copper Company, a corporation mentioned in the complaint herein, was defendant; that said action was brought for the purpose of foreclosing that certain mortgage or deed of trust mentioned in paragraph 9 of said complaint, to recover the principal and unpaid interest upon $2,000,000 of bonds of said Imperial Copper Company mentioned in said paragraph 9, to have the same declared a first lien upon the mining property, real estate and the shares of the capital stock of Arizona Southern Railroad Company and Southern Arizona Smelting Company, mentioned in plaintiff's bill of complaint herein.

That at the time of the filing of said complaint for foreclosure of said mortgage or deed of trust aforesaid, no bankruptcy proceedings had been instituted against the said Imperial Copper Company; but that within a few days after the commencement of such suit the bankruptcy proceedings mentioned in plaintiff's bill of complaint were instituted; that at the time when said foreclosure suit was instituted, and before the institution of said bankruptcy proceedings against the Imperial Copper Company, said District Court of the Territory of Arizona in which said foreclosure suit was pending, by its order appointed Merrill P. Freeman, as

its Receiver in said action, who thereupon qualified as such Receiver, and prior to the institution of said bankruptcy proceedings took actual charge and custody of all of the mines, mining property, real estate and shares of stock above mentioned, and ever since has had and still continues to have charge, custody and possession of all of said mines, mining property and real estate, aforesaid.

2. That on or about July 9, 1914, pursuant to proper proceedings in that behalf, plaintiff herein, John H. Martin, as Trustee in Bankruptcy of Imperial Copper Company, a corporation, [19] bankrupt, intervened and became a party defendant in this foreclosure suit aforesaid, and filed his answer therein, wherein, amongst other things, he did pray the said Court to decree that the said bonds and mortgage or trust deed aforesaid be decreed to be of no force and effect whatsoever as against him, plaintiff herein, as Trustee in Bankruptcy as aforesaid, or as against the creditors of the said Imperial Copper Company, Bankrupt, and did also pray for all other special or general relief as might be proper in the premises, and did further pray that the said foreclosure suit, in so far as it related to the shares of stock of the said Southern Arizona Smelting Company, and the said shares of stock of the said Arizona Southern Railroad Company, be dismissed and abated. That in and by said answer, plaintiff herein, as such intervenor, set forth and alleged substantially the same matters as are set forth and alleged in the bill of complaint herein, touching said mortgage or deed of trust and

said bonds and the rights of the Imperial Copper Company and of the plaintiff, as Trustee in Bankruptcy of the Imperial Copper Company, as against the holders of said bonds and said Bankers Trust Company, in or to said shares of stock and said mines, mining property and real estate described in the bill of complaint herein; that issues were duly joined in said action upon all of said matters; that thereafter due proceedings were had in said case, and that on the 28th day of December, 1914, the said Superior Court aforesaid, made, filed and rendered its findings of fact, conclusions of law, judgment and order of sale in said action, in favor of said Bankers Trust Company as plaintiff, and against said Imperial Copper Company and John H. Martin, as Trustee in Bankruptcy of said Imperial Copper Company as Intervenor; a true and correct copy of which findings of fact and conclusions of law is hereto [20] annexed, marked Exhibit "A," and a true and correct copy of which said judgment and order of sale is hereunto annexed, marked Exhibit "B," all of which are as fully made a part hereof as if set out at length at this point. That said findings of fact, conclusions of law, judgment and order of sale, at all times since have been and now are in full force and effect, and have not been in any respect vacated or modified or set aside.

3. That thereafter, pursuant to due and proper proceedings in that behalf, and in accordance with said judgment and order of sale, on the 31st day of March, 1915, Merrill P. Freeman, as Receiver and

Special Master of said Superior Court of the State of Arizona, in and for the County of Pima, did offer for sale at public vendue, and did sell all of the said mortgaged property aforesaid, being all of the mines, mining claims and real estate and all of the shares of stock of the said Arizona Southern Railroad Company and all of the shares of stock of the said Southern Arizona Smelting Company, which are mentioned and described in paragraph 9 of plaintiff's bill of complaint herein, as well as all other property that was covered or included by the said mortgage or trust deed, and the judgment and decree of said court aforesaid, as by the judgment and order of sale of the said Superior Court he was authorized and directed to do; that at said sale one Leo Goldschmidt became the purchaser of all of said property aforesaid, he being the highest and best bidder; that his bid was accepted by the said Receiver and Special Master, and all of said property was then and there struck off to him, the said real property, however, being sold subject to the right of redemption as provided for by the statutes of the State of Arizona. That the said Receiver and Special Master did, immediately after the said [21] sale, make and file with the said Superior Court his report of the said sale, and his prayer for confirmation of said sale; that his said application for confirmation of sale were set for hearing for the 17th day of April, 1915; that due notice of the said hearing was duly served upon the said John H. Martin, Trustee in Bankruptcy of the said Imperial Copper Company, Bankrupt, plaintiff herein; that on the

said 17th day of April, 1915, the said motion and application of said Receiver, for confirmation of said sale came up for hearing before the said Superior Court aforesaid, and the said John H. Martin, Trustee, as aforesaid, plaintiff herein, and his attorney of record were present in said court when said application was so heard; that the Superior Court did, on said day, make, render and enter its order confirming the said sale so made by said Receiver and Special Master, to said Leo Goldschmidt, the purchaser at said sale aforesaid, and did direct the said Receiver and Special Master to execute to the said Leo Goldschmidt a bill of sale, selling, assigning and transferring unto him all of the said shares of stock of the said Southern Arizona Smelting Company and Arizona Southern Railroad Company aforesaid, and directing him to deliver the certificates f. all of said shares of stock of said companies to said eo Goldschmidt, upon the said Leo Goldschmidt paying the purchase price bid by him therefor, and the said Court did further authorize and direct said Receiver and Special Master to execute and deliver to said Leo Goldschmidt a certificate of sale for all of said mines, mining claims and real property, so sold to him as aforesaid, upon his paying the said purchase price so bid by him aforesaid, therefor. That the said Leo Goldschmidt, long prior to the commencement of the present action, did make payment to said Receiver and Special Master of the said purchase price so bid by him for [22] all of said property aforesaid, and the said Receiver and Special Master did, a long time before the com-

mencement of the present action, execute and deliver to said Leo Goldschmidt a bill of sale or other written evidence of sale, transfer and assignment of all of said shares of stock aforesaid, and did deliver the said certificates for all of said shares of stock to said Leo Goldschmidt; and did also execute and deliver to said Leo Goldschmidt a certificate of sale for all of the mines, mining claims and real property so sold by him to said Goldschmidt, as aforesaid.

5. That by reason of the matters and things aforesaid, and of the said judgment and sale and confirmation of sale aforesaid, plaintiff herein, as Trustee of the Imperial Copper Company, a bankrupt, and the said Imperial Copper Company itself, are each forever barred and estopped from claiming any right, title or interest in and to any of the mines, mining claims or real property aforesaid, except the right which the said plaintiff as Trustee in Bankruptcy, aforesaid, has, or may have, to redeem said real property from said sale, under the right of redemption given under the statutes of Arizona.

And that, by reason of the said matters and things aforesaid, the plaintiff is barred and estopped from questioning or litigating in this Honorable Court, any of the said matters or things aforesaid, and particularly is barred and estopped from asserting or claiming any right, title, or interest in or to any of the said real estate aforesaid, except the right of redemption, and any right, title or interest of any kind or nature in or to the said shares of stock aforesaid, and that being so estopped and barred, his present action, wherein he seeks again to litigate all of the

matters and things so adjudicated against him by the said [23] Superior Court aforesaid, should be dismissed and judgment be rendered against him.

ANSWER TO THE MERITS.

And this defendant, not waiving its said motion to dismiss for want of jurisdiction, but if the same be overruled, then further answering said bill of complaint does say:

1. Answering the allegation of paragraph 1 of the bill of complaint, this defendant denies that during all or any of the times mentioned in said bill of complaint, it owned property or conducted or transacted business within the State of Arizona.

2. Answering paragraph 2 of the bill of complaint, this defendant denies that this is a matter or proceeding in bankruptcy.

3. Answering paragraph 3 of the bill of complaint, defendant denies that during all the times mentioned therein, it was or now is engaged in the business of purchasing, developing or operating mines or smelting properties, or in the building or operating of railroads in the State of Arizona.

4. Answering paragraph 4 of said bill of complaint, this defendant denies that on or about May 11, 1903, it created, or caused to be created or organized, under the laws of Arizona, the Imperial Copper Company, for the purposes mentioned in said paragraph, or at all, or for the use and benefit of this defendant, or for any purpose whatsoever.

5. Answering paragraph 5 of said complaint, defendant denies that all of the incorporators, directors, or officers of said Copper Company were

at all times employees of said Development Company. Denies that at all the times mentioned in said complaint, or up until March 31, 1915, this defendant owned or controlled practically all of the shares of the capital [24] stock of said Copper Company, but alleges that it did at certain time own large number of shares of stock of the said Copper Company, and that it did vote said shares at stockholders' meeting, as it was by law entitled to do; but defendant denies, as alleged in said paragraph or otherwise, that it elected all of the directors, officers and managers of the said Copper Company from its own employees, directors and officers; denies that it controlled, directed, handled or transacted all or any of the business of said Copper Company as a department or bureau of the business of this defendant, or collected, received, handled or used all or any of the moneys or proceeds from the operation of the said mining properties, or all or any of the profits thereof. Denies that this defendant appropriated all or any of said moneys, proceeds or profits to its own use, either as alleged in said paragraph or otherwise.

6. Answering paragraph 6 of said complaint, this defendant denies that it caused the title of said mining properties to be taken in the name of said Copper Company; denies that it caused the same to be developed or operated in the name of said Copper Company, or for the use or benefit of this defendant, or at all. Denies that the title to said properties was taken in the name of said Copper Company, or that said properties were operated in the name of said Copper Company, as a convenience to this de-

fendant, or to facilitate the business of this defendant, either as alleged in said paragraph 6 or otherwise.

7. Answering paragraph 7 of said complaint this defendant is unable to ascertain therefrom at what period or time the board of directors of the Copper Company was composed of the seven persons mentioned in said paragraph, or the times when F. M. Murphy, E. B. Gage, H. M. Robinson, [25] Selwyn Eddy and B. L. Mason were directors of this defendant and for that reason is unable either to admit or deny said allegation. And for the same reason this defendant is unable to admit or deny the allegations of said paragraph concerning the individuals who constituted the executive committee of said defendant, and the executive committee of said Copper Company.

8. Answering the allegations of paragraph 8 of said complaint, this defendant denies that, either as alleged therein or otherwise, it created the said Copper Company or used the same as an auxiliary, subsidiary, branch, agent or instrumentality in conducting or carrying on the business of this defendant, or at all.

9. Answering the allegations of paragraph 9 of said complaint, this defendant denies that in the year 1903, or at any other time, it caused said Copper Company to execute a first or any mortgage or deed of trust upon all or any of its mining properties, as alleged in said paragraph, or at all. And denies that the mortgage or deed of trust mentioned in said paragraph was executed for the use or bene-

fit of this defendant, or that this defendant used all or any of said bonds or of the proceeds of sale thereof, in its business, or that it used all or any of the capital stock of said Copper Company, or the proceeds of the sale thereof, in the business of this defendant, either as alleged in said paragraph or at all.

10. Answering the allegations of paragraph 10 of said complaint, this defendant denies that in furtherance of its business or for any of the purposes mentioned in said paragraph, or at all, this defendant created two certain or any dummy corporations under the laws of Arizona. Denies that Arizona Southern Railroad Company or Southern Arizona [26] Smelting Company were or have been dummy corporations, either as alleged in said paragraph or otherwise; denies that this defendant created the said Arizona Southern Railroad Company or the Southern Arizona Smelting Company; denies that this defendant elected all or any of the directors, officers or managers of either of said corporations, or at any time controlled or managed the affairs of both or either of said corporations, as bureaus or departments of its business, either as alleged in said paragraph or otherwise; denies that this defendant caused all or any of the shares of the capital stock of said two corporations, or either of them, to be issued to or held in the name of the Copper Company; denies that in 1904, or at any other time, this defendant caused all or any of the shares of the capital stock of said Railroad Company, or of said Smelting Company to become sub-

ject to the lien of said mortgage or deed of trust, either as alleged in said complaint, or otherwise.

11. Answering the allegations of paragraph 11 of said complaint, this defendant denies that any of the mining or other properties described in said paragraph were purchased, developed or operated by this defendant, through the Imperial Copper Company, or said Arizona Southern Railroad Company or said Southern Arizona Smelting Company. And denies that any of said mining or other properties were subjected by this defendant to the lien of said mortgage or deed of trust, either as alleged in said paragraph or otherwise.

12. Answering the allegations of paragraph 12 of said complaint, this defendant denies that on the 3d day of July, 1911, it owned, held and controlled a majority or any of said bonds, and all or any of the shares of stock of said Copper Company; denies that on said date, or at any time, either as alleged in said paragraph or otherwise, this defendant caused a suit to be [27] instituted for the foreclosure of said mortgage or deed of trust; denies that, either as alleged in said paragraph, or otherwise, this defendant obtained a decree of foreclosure of said mortgage or deed of trust, or an order of sale of the mining properties and shares of stock mentioned in said paragraph; denies that, either as alleged in said paragraph or otherwise, this defendant caused all or any of said mining properties and shares of stock to be sold under said foreclosure, or caused the same, or any part thereof, to be bid in at such sale, in the name of Leo Goldschmidt,

either as alleged in said complaint or at all; and denies that said Leo Goldschmidt purchased said property for the use or benefit of this defendant, or for the use or benefit of said F. M. Murphy, the President and chief officer of this defendant, or as representing the stockholders and bondholders, or any of them, of this defendant; denies that this defendant or the said F. M. Murphy, as the real parties in interest in said purchase at said foreclosure sale, are now negotiating for the sale of all or any of said mining properties and shares of stock or as parties interested in said purchase have made and entered into some character of agreement with the American Smelting & Refining Company, a corporation, as alleged in said complaint, for the sale of all or any of said mining properties and shares of stock. And this defendant has no knowledge as to whether the said Smelting & Refining Company is now in possession of said mining properties, or is working the same.

13. Answering the allegations of paragraph 13 of said complaint, this defendant denies that any of the claims mentioned in said paragraph as having been filed in the bankruptcy proceedings against said Copper Company, excepting only, the claims of this defendant for the sum of $39,423.02, were controlled by this defendant, or by the said F. M. Murphy [28] as President or chief officer of this defendant. This defendant has no knowledge as to what is shown by the various proofs of debt filed in said bankruptcy proceedings, as alleged in said paragraph, and therefore neither admits nor denies

the allegations in relation thereto.

14. Answering the allegations of paragraph 14 of said complaint, this defendant admits said allegations.

15. Answering the allegations of paragraph 15 of said complaint, this defendant denies that at any time there was some or any character of agreement between this defendant the said Murphy as the President and chief officer thereof, and the creditors of said estate, that said bankruptcy proceedings should lie dormant, or that this defendant and said Murphy should be allowed time within which to refinance or rehabilitate said mining properties, or to enable this defendant or the said Murphy to raise sufficient funds with which to liquidate, pay off or discharge the debts mentioned in said paragraph, either as alleged therein or otherwise. Denies that in pursuance of such or any agreement, or relying upon any representations or promises alleged to have been made by this defendant or the said Murphy, the said creditors or any of them allowed said bankruptcy proceedings to lie dormant until some time in 1914, or until the election or qualification of plaintiff herein as such Trustee; denies that any seeming delay in the institution of this action was caused either in whole or part by this defendant, or by the said F. M. Murphy, either as alleged in said paragraph or otherwise. Denies that this defendant or the said F. M. Murphy controlled the said bankruptcy proceedings during all or any of the time mentioned in said paragraph.

16. Answering the allegations of paragraph 16

of said bill of complaint, this defendant denies that the sale [29] of said mining properties and shares of stock under said foreclosure proceedings was caused by any action of this defendant, either as alleged in said paragraph or otherwise; denies that said sale resulted in stripping said Copper Company of all or any of its assets, to which plaintiff herein as trustee in bankruptcy might or could have been entitled, either as alleged in said paragraph or otherwise.

17. Answering the allegations of paragraph 17 of said complaint, this defendant denies that there has not been sufficient moneys or property come into the hands of plaintiff as Trustee of said estate with which to pay dividends upon the claims filed and allowed by the Referee in said bankruptcy proceedings.

18. Answering the allegations of paragraph 18 of said complaint, this defendant says that it has no knowledge as to whether or not plaintiff is advised and informed that this defendant became or is liable for, all or any of the debts of said Copper Company as filed and allowed in said bankruptcy proceedings, and as alleged in said paragraph or at all; this defendant denies that it became or is liable for all or any of the debts of said Copper Company, whether the same be filed or allowed in said bankruptcy proceedings or not. And defendant denies that all or any of the mining property or the said shares of stock of the said Railroad Company or of the said Smelting Company, or any thereof, were purchased at the foreclosure sale by this defendant, or were purchased for its use or benefit, and

denies that the same, or any part thereof, are liable for all or any of said debts as alleged in said paragraph or at all.

WHEREFORE, defendant having fully answered, prays that plaintiff take nothing by his action and for its costs in this behalf expended.

SELIM M. FRANKLIN,
ELLINWOOD & ROSS,
Attorneys for Development Company of America, a Corporation. [30]

[Endorsed]: E–27 (Tucson). In the U. S. District Court, District of Arizona. John H. Martin, etc., Plaintiff, vs. Development Company of America, a Corporation, Defendant. Motions and Answer. Filed September 28, 1915. George W. Lewis, Clerk. By Effie D. Botts, Deputy. Service admitted this 28th day of Sept., 1915. Francis M. Hartman, Attorney for Plff. [31]

In the United States District Court for the District of Arizona.

IN EQUITY—No. E–27 (Tucson).

JOHN H. MARTIN, Trustee of Imperial Copper Company, a Corporation, Bankrupt,
Plaintiff,

vs.

THE DEVELOPMENT COMPANY OF AMERICA, a Corporation,
Defendant.

Judgment.

The motion of defendant in this cause, The Devel-

opment Company of America, a corporation, to dismiss the complaint of plaintiff, on the ground that the same does not state facts sufficient to constitute any cause of action against it, nor any cause of action whatsoever against said defendant, having heretofore been heard and submitted to the court, Selim M. Franklin, Esq., appearing as counsel for said defendant, and Francis M. Hartman, Esq., and E. F. Jones, Esq., as counsel for plaintiff, and the Court being fully advised in the premises, does hereby ORDER that said motion be sustained, and that judgment dismissing said cause be entered herein. To all of which rulings and orders, and to each of them, plaintiff excepted.

WM. H. SAWTELLE,
Judge.

Dated this 6th day of June, 1916.

[Endorsements]: In Equity—No. E–27. In the United States District Court for the District of Arizona. John H. Martin, Trustee, etc., Plaintiff, vs. The Development Company of America, a Corporation, Defendant. Judgment. Filed June 6th, 1916. Mose Drachman, Clerk. [32]

In the United States District Court for the District of Arizona.

IN EQUITY—No. E–27.

JOHN H. MARTIN, Trustee in Bankruptcy, of the Imperial Copper Company, a Corporation, Bankrupt,

Plaintiff,

vs.

THE DEVELOPMENT COMPANY OF AMERICA, a Corporation,

Defendant.

Petition for Appeal.

Now comes the above-named John H. Martin, Trustee in Bankruptcy, of the Imperial Copper Company, a corporation, bankrupt, plaintiff herein, by Francis M. Hartman, Esq., and Edwin F. Jones, Esq., his attorneys, in open court, on this 6th day of June, A. D. 1916, at the time of the rendition and signing of the order, judgment and decree in the above-entitled cause, and, conceiving himself to be aggrieved by the order, judgment and decree rendered herein, does hereby appeal from the said order, judgment and decree, and the whole thereof, to the United States Circuit Court of Appeals for the Ninth Circuit, and he prays that this appeal may be allowed and that a transcript of the record, proceedings and papers upon which said judgment was made, duly authenticated, may be sent to the said United States Circuit Court of Appeals for the Ninth Circuit.

Dated at Tucson, June 6th, A. D. 1916.

FRANCIS M. HARTMAN,
EDWIN F. JONES,
Solicitors for John H. Martin, etc., Plaintiff.

And now, to wit, on June 14, 1916, it is ordered that the appeal be allowed as prayed for.

WM. H. SAWTELLE,
Judge. [33]

[Endorsements]: No. E–27 (Tucson.) In the United States District Court for the District of Arizona. John H. Martin, Trustee, etc., Plaintiff, vs. The Development Company of America, a Corporation, Defendant. Petition for Appeal. Copy rec'd June 14, 1916. Selim M. Franklin, Atty. for Defendant. Filed June 14th, A. D. 1916. Mose Drachman, Clerk. [34]

In the United States District Court for the District of Arizona.

Minute Entry Made on June 14th, 1916.

IN EQUITY—No. E–27.

JOHN H. MARTIN, Trustee in Bankruptcy, of the Imperial Copper Company, a Corporation, Bankrupt,

Plaintiff,

vs.

THE DEVELOPMENT COMPANY OF AMERICA, a Corporation,

Defendant.

Order Allowing Appeal, etc.

Upon the rendering of the order, judgment and decree herein in the above-entitled cause on this date, sustaining the defendant's motion to dismiss plaintiff's complaint on the ground that the same does not state facts sufficient to constitute a cause of action, John H. Martin, Trustee in Bankruptcy of The Imperial Copper Company, a corporation, bankrupt, by Francis M. Hartman, Esq., and Edwin F. Jones, Esq., his solicitors, and attorneys, gave notice in open court of his appeal to the United States Circuit Court for the Ninth Circuit, from the said order, judgment and decree of this court, and at the same time did file herein his assignment of errors.

This Court did then order, as no bond was required from said trustee in bankruptcy, that an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from the said order, judgment and decree so rendered herein, be and the same is hereby allowed to the said John M. Hartman, Trustee in Bankruptcy of said The Imperial Copper Company, a corporation, bankrupt, plaintiff, and that a certified transcript be transmitted to the United States Circuit Court of Appeals for the Ninth Circuit, as provided by law and the rules of said court.

And, it having been stipulated and agreed in open court [35] between the parties, by their respective attorneys, that this order be made and entered as of June 6, A. D. 1916, the date of rendition of said order, judgment and decree, it is therefore

ordered that this minute order be so entered as of said date. [36]

In the United States District Court for the District of Arizona.

IN EQUITY—No. E–27.

JOHN H. MARTIN, Trustee in Bankruptcy of THE IMPERIAL COPPER COMPANY, a Corporation, Bankrupt,

Plaintiff,

vs.

THE DEVELOPMENT COMPANY OF AMERICA, a Corporation,

Defendant,

Plaintiff's Assignment of Errors.

And now, on the 14th day of June, A. D. 1916, came the above-named plaintiff, by his solicitors, Francis M. Hartman and Edwin F. Jones and says that the order judgment and decree entered in the above-entitled cause on the 6th day of June, A. D., 1916, is erroneous and unjust to defendant:

FIRST. Because defendant filed its answer to the merits of plaintiff's bill at the same time that it filed its motion to dismiss said bill for want of equity.

SECOND. Because the Court erred in holding that defendant had not waived its motion to dismiss plaintiff's bill for want of equity by filing at the same time its answer to the merits of said bill.

THIRD. Because the Court erred in holding that plaintiff's said bill of complaint does not state facts

sufficient to constitute a cause of action against defendant.

FOURTH. Because the Court erred in sustaining defendant's motion to dismiss said complaint for want of equity and in dismissing said action.

WHEREFORE, plaintiff prays that the said order, judgment and decree be reversed, and that the said United States District Court for the District of Arizona be instructed to enter an [37] order overruling and denying defendant's said motion to dismiss, and for further proceedings thereon as prayed for in said bill of complaint.

FRANCIS M. HARTMAN,
EDWIN F. JONES,

Solicitors for Appellant, John H. Martin, Trustee in Bankruptcy of the Imperial Copper Company, a Corporation, Bankrupt.

[Endorsements]: In the U. S. District Court for the District of Arizona. No. E–27 (Tucson). John H. Martin, Trustee of Imperial Copper Company, a Corporation, Bankrupt, Plaintiff, vs. The Development Company of America, a Corporation, Defendant. Plaintiff's Assignment of Errors. Copy received June 14, 1916. Selim M. Franklin, Attorney for Defendant. Filed June 14, 1916. Mose Drachman, Clerk. [38]

In the United States District Court for the District of Arizona.

IN EQUITY—No. E–27.

JOHN H. MARTIN, Trustee in Bankruptcy of THE IMPERIAL COPPER COMPANY, a Corporation, Bankrupt,

Plaintiff,

vs.

THE DEVELOPMENT COMPANY OF AMERICA, a Corporation,

Defendant,

Praecipe for Transcript of Record.

To the Clerk of the Above-entitled Court:

You will please prepare transcript of the record of this cause, to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit under the appeal heretofore perfected, and include in said transcript the following pleadings, proceedings and papers on file, to wit:

1. The Complaint.
2. Defendant's Motion to Dismiss for Want of Jurisdiction.
3. Defendant's Motion to Dismiss for Want of Insufficiency of Fact to Constitute a Valid Cause of Action in Equity.
4. Defendant's Plea in Bar.
5. Defendant's Answer to the Merits (Omitting all Exhibits which are Attached to said Answer).

6. The Judgment and Decree.
7. Petition for Appeal and Allowance of Appeal.
8. Assignment of Errors.
9. The Clerk's Certificate.
10. This Praecipe.

The said transcript to be filed with the Clerk of the Circuit Court of Appeals of the Ninth Circuit at San Francisco, California, before July 5th, 1916.

FRANCIS M. HARTMAN,
EDWIN F. JONES,
Solicitors for Appellant. [39]

Service of copy accepted this 14th day of June, 1916.

SELIM M. FRANKLIN,
Attorney for Defendant.

[Endorsements]: No. E–27—Tucson. In the U. S. District Court of the District of Arizona. John H. Martin, Trustee in Bankruptcy of the Imperial Copper Company, a Corporation, Bankrupt, Plaintiff, vs. The Development Company of America, a Corporation, Defendant. Plaintiff's Praecipe for Transcript. Filed June 14, A. D. 1916. Mose Drachman, Clerk. [40–41]

Certificate of Clerk United States District Court to Transcript of Record.

United States of America,
District of Arizona,—ss.

I, Mose Drachman, Clerk of the United States District Court for the District of Arizona, do hereby

certify that the foregoing pages, numbered one to forty, inclusive, constitute and are a true, complete and correct copy of the transcript of record prepared by counsel in the case of John H. Martin, Trustee in Bankruptcy of the Imperial Copper Company, a Corporation, Bankrupt, Appellant, vs. The Development Company of America, a Corporation, Appellee. In Equity—No. E–27 (Tucson), as the same remain on file and of record in said District Court, and as the same is called for in the praecipe filed herein.

I further certify that the cost of preparing and certifying to said record amounts to the sum of $24.50, and that the same has been paid in full by the appellant, John H. Martin, Trustee in Bankruptcy of the Imperial Copper Company, a corporation.

In testimony whereof, I have hereunto set my hand and affixed the seal of the United States District Court for the District of Arizona at Tuscon, in said District, this 23d day of June, in the year of our Lord One Thousand Nine Hundred and Sixteen, and of the Independence of the United States of America, the one hundred and fortieth.

[Seal] MOSE DRACHMAN,
Clerk United States District Court, District of Arizona.

By Effie D. Botts,
Deputy Clerk. [42]

[Endorsed]: No. 2822. United States Circuit Court of Appeals for the Ninth Circuit. John H. Martin, as Trustee in Bankruptcy of the Imperial Copper Company, a Corporation, Bankrupt, Appel-

lant, vs. The Development Company of America, a Corporation, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the District of Arizona.

Received June 26, 1916.

F. D. MONCKTON,
Clerk.

Filed June 29, 1916.

FRANK D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

No. 2822

In the United States

Circuit Court of Appeals

For the Ninth Circuit

John H. Martin, Trustee in Bankruptcy of The Imperial Copper Company, a Corporation, Bankrupt,

Appellant,

—vs.—

The Development Company of America, a Corporation,

Appellee.

Filed
1916
F. D. Monckton

BRIEF OF APPELLANT

FRANCIS M. HARTMAN,
EDWIN F. JONES,
Tucson, Arizona,
Attorneys for Appellant.

In the United States
Circuit Court of Appeals
For the Ninth Circuit

John H. Martin, Trustee in Bankruptcy of The Imperial Copper Company, a Corporation, Bankrupt,

Appellant,

—vs.—

The Development Company of America, a Corporation,

Appellee.

No. 2822.

BRIEF OF APPELLANT

STATEMENT OF THE CASE

This is an appeal brought to this court by John H. Martin, Trustee in Bankruptcy of The Imperial Copper Company, a corporation, bankrupt, from the decree entered by the United States District Court for the District of Arizona, on June 6, 1916, in the case pending therein, entitled John H. Martin, Trustee in Bankruptcy of The Imperial Copper Company, a corporation, plaintiff, vs. The Development Company of America, a cor-

poration, defendant, dismissing said cause for want of equity.

This action was instituted in the court below by Martin, Trustee in Bankruptcy of The Imperial Copper Company, a corporation, bankrupt, to recover of and from The Development Company of America, a corporation, all of the debts filed and allowed against the Copper Company, amounting approximately to $1,250,000 on the ground that the Development Company was the parent company of the Copper Company; that the Copper Company was merely a creature, subsidiary, agent, adjunct and instrumentality of the Development Company, and used and treated as such by the Development Company, and that the said debts were really incurred by the Development Company.

The complaint also contained allegations to the effect that the Development Company caused or procured all the properties of the Copper Company to be sold under a certain foreclosure proceeding, and that The Development Company has received or is to receive a certain interest in all of said properties through such foreclosure proceedings, over and above anything the creditors are to receive; and that the creditors of the Copper Company are entitled to have such interest subjected to the payment of their debts.

Defendant filed at the same time and as one paper, its motion to dismiss for want of jurisdiction, motion to dismiss for insufficiency of fact to constitute a valid

cause of action in equity, plea in bar, and answer to the merits.

(Transcript, pp 22 to 38).

The Court, on June 6, 1916, made and entered the following order:

"The motion of defendant in this cause, The Development Company of America, a corporation, to dismiss the complaint of plaintiff, on the ground that the same does not state facts sufficient to constitute any cause of action against it, nor any cause of action whatsoever against said defendant, having heretofore been heard and submitted to the court, Selim M. Franklin, Esq., appearing as counsel for said defendant, and Francis M. Hartman, Esq., and E. F. Jones, Esq., as counsel for plaintiff, and the court being fully advised in the premises, does hereby ORDER that said motion be sustained, and that judgment dismissing said cause be entered herein. To all of which rulings and orders, and to each of them, plaintiff excepted.

(Signed) WILLIAM H. SAWTELLE,
Judge."

The questions involved are:

(1) Did the defendant, by filing at the same time and as one paper its said motions to dismiss for want of jurisdiction, to dismiss for want of fact to constitute a valid cause of action in equity, plea in bar, and answer

to the merits, waive its said motion to dismiss for want of fact or for want of equity.

(2) Does the complaint contain sufficient allegations of fact to constitute a valid cause of action in equity against defendant.

ASSIGNMENT OF ERRORS

Appellant relies upon the following assignment of errors:

That the order, judgment and decree entered in the above entitled cause on the 6th day of June, A. D. 1916, is erroneous and unjust to plaintiff:

FIRST: Because defendant filed its answer to the merits of plaintiff's bill at the same time that it filed its motion to dismiss said bill for want of equity:

SECOND: Because the Court erred in holding that defendant had not waived its motion to dismiss plaintiff's bill for want of equity by filing at the same time its answer to the merits of said bill:

THIRD: Because the Court erred in holding that plaintiff's said bill of complaint does not state facts sufficient to constitute a cause of action against defendant.

FOURTH: Because the Court erred in suctaining defendant's motion to dismiss said complaint for want of equity and in dismissing said action.

ARGUMENT

We will discuss first, the question raised by the Third and Fourth Assignments of Error,—the sufficiency of the complaint as against the defendant's motion to dismiss for want of equity, or for insufficient facts to constitute a valid cause of action in equity.

The complaint contained allegations as follows: Tr., pp 1 to 21.

"That the plaintiff is now and has been since on or about July 2, 1914, the duly elected, qualified and acting Trustee in Bankruptcy of the Imperial Copper Company, a corporation, bankrupt, and is a citizen of the State of Arizona, and a resident of Pima County, in said State; and that the defendant, The Development Company of America, during all the times mentioned herein, was and is a corporation organized, created by and existing under and by virtue of the laws of the State of Delaware, and owning property, conducting and transacting business and having an Agent within the State of Arizona.

II

"That this suit is between citizens of different states; and is a matter or proceeding in bankruptcy. That the amount in controversy herein exceeds the sum of three thousand dollars ($3,000.00), exclusive of interest and costs.

III

"That the defendant, during all the times mentioned

herein was and is now engaged in the business of purchasing, developing and operating mining and smelting properties, and in the building and operating of railroads, in the State of Arizona.

IV

"That the said defendant, heretofore, in the year 1903, acquired, owned and held a certain contract for the purchase of certain mining properties situate at Silver Bell, Pima County, Arizona, and being those certain mining properties hereinafter more particularly described, for the price and sum of five hundred fifteen thousand dollars ($515,000.00), and that thereafter on or about May 11, 1903, defendant created and caused the said Imperial Copper Company, a corporation, to be organized under the laws of Arizona, for the purpose of consummating, carrying out and carrying into effect, the said contract of purchase, for the use and benefit of defendant, and for the purpose of purchasing, developing and operating said mining properties, for the use and benefit of defendant, and for the purpose of carrying on and conducting the business of the said defendant, for its use and benefit, in which it was so engaged as aforesaid.

V

"That all of the incorporators, directors and officers of the said Copper Company, were at all times employees of the said Development Company.

"That the said Development Company, at all the

times herein mentioned, and up until on or about March 31, 1915, owned and controlled practically all of the shares of the capital stock of the said Copper Company; and from the date of the organization of the said Copper Company and up until some time in 1911, when the said Copper Company was adjudicated a bankrupt, as hereinafter set forth, elected all of the directors, officers and managers of the said Copper Company, from its own employees, directors and officers; and controlled, directed, handled and transacted all of the business of the said Copper Company; and collected, received, handled and used all of the moneys and proceeds derived from the operation of the said mining properties, and all the profits thereof, and appropriated the same to its own use, in its business of purchasing, developing and operating mining and smelting properties as aforesaid.

VI

"That the said Development Company caused the title to the said mining properties so situate at Silver Bell, Pima County, Arizona, to be taken in the name of the said Copper Company, and caused the said mining properties to be developed and operated in the name of the said Copper Company, and for the use and benefit of the said Development Company; and that the title to the said properties was so taken in the name of the said Copper Company, and the said properties so operated in the name of the said Copper Company, as a convenience to the said Development Company and to fa-

cilitate the said business of the said Development Company of purchasing, developing and operating mining and smelting properties.

VII

"That F. M. Murphy, a resident of the County of Yavapai, State of Arizona, is now, and during all the times mentioned herein was, the President and chief officer of the said Development Company, and is now, and has been since November 9, 1909, the President and chief officer of the said Copper Company.

"That the Board of Directors of the said Copper Company was composed of seven persons, to-wit: F. M. Murphy, E. B. Gage, H. M. Robinson, Selwyn Eddy, V. L. Mason, W. F. Staunton and A. N. Gage; and that the said F. M. Murphy, E. B. Gage, H. M. Robinson, Selwyn Eddy and V. L. Mason, were, at the same time, directors in the said Development Company.

"That the Executive Committees of the said Development Company and the said Copper Company were composed of practically the same individuals, in this to-wit: that the Executive Committee of the said Development Company was composed of F. M. Murphy, E. B. Gage, H. M. Robinson, V. L. Mason and B. P. Cheney; and that the Executive Committee of the said Copper Company was composed of F. M. Murphy, E. B. Gage, H. M. Robinson, V. L. Mason and W. F. Staunton.

VIII

"That the said Development Company so created the

said Copper Company and used the same as an auxiliary, subsidiary, branch, agent and instrumentality, in conducting and carrying on its said business of purchasing, developing and operating mining and smelting properties.

IX

"That the said Development Company in 1903, caused the said Copper Company to execute a first mortgage or deed of trust upon all of said mining properties, to secure a bond issue in the sum of two million dollars ($2,000,000.00), for the use and benefit of the said Development Company, and that all of said bonds were issued and delivered to the said Development Company, and that the said Development Company used all of said bonds and the proceeds of the sale thereof in its business of purchasing, developing and operating mining and smelting properties; and that the said Development Company also used all the capital stock of the said Copper Company, of the par value of five million dollars ($5,000,000.00), and the proceeds of the sale thereof, in its said business of purchasing, developing and operating mining and smelting properties in Arizona.

X

"That the said Development Company, in furtherance of its said business of purchasing, developing and operating mining and smelting properties, in Arizona, and especially those certain mining and smelting properties situated in Pima and Pinal Counties, Arizona, hereinafter referred to, and for the purpose of carrying

on and engaging in its said business in Arizona, also, sometime in 1903 and 1904, created those two certain other dummy corporations under the laws of Arizona, to-wit, the Arizona Southern Railroad Company and the Southern Arizona Smelting Company, and elected all the directors, officers and managers of said dummy corporations, and at all times controlled and managed the affairs and business of both such dummy corporations, as bureaus or departments of its said business; and caused all the shares of the capital stock of the said two corporations to be issued to and to be held in the name of said Copper Company; and thereafter, in 1904, the said Development Company, caused all the shares of the capital stock of the said Railroad Company and of the said Smelting Company to become subject to the lien of the said mortgage or deed of trust, as additional collateral security for the said issue of bonds in the sum of two million dollars, so theretofore issued and delivered to the said Development Company.

XI

"That the mining properties so purchased, developed and operated by the said Development Company, through the said Imperial Copper Company, the said Arizona Southern Railroad Company and the said Southern Arizona Smelting Company, and so covered by the said mortgage or deed of trust, are situate in the Silver Bell Mining District, Pima County, Arizona, and in Pinal County, Arizona, and are more particularly described as follows, to wit:

(Description of properties, See Transcript, pp 7 to 11).

"That the shares of stock hereinbefore referred to as having been made subject to the lien of said mortgage by the said Development Company, are described as follows, to-wit:

"Eight thousand (8,000) shares of the capital stock of the Arizona Southern Railroad Company, an Arizona Corporation; and nine thousand (9,000) shares of the capital stock of the Southern Arizona Smelting Company, an Arizona Corporation.

XII

"Plaintiff is informed and believes and upon such information and belief alleges, that on July 3, 1911, the said Development Company being then and there the owner and holder of and controlling a majority of said bonds and the said shares of stock of the said Copper Company, caused a suit to be instituted in the then District Court of the First Judicial District of the Territory of Arizona, in and for the County of Pima, to foreclose said mortgage or deed of trust on all of the said mining properties, and on said shares of stock of said Railroad Company and the said Smelting Company, and thereafter, on December 28, 1914, obtained a decree of foreclosure of said mortgage or deed of trust, by the Superior Court of the State of Arizona, in and for the County of Pima, the successor of the last above named court, and an order of sale of all of said mining properties and of

said shares of stock; and thereafter, on March 31, 1915, the said Development Company caused all of said mining properties and said shares of stock to be sold under such foreclosure, and caused the said mining properties to be bid in at such sale, in the name of Leo Goldschmidt of Tucson, Pima County, Arizona, at the price of ninety thousand dollars ($90,000) and the said shares of stock of the said Railroad Company and said Smelting Company at the price of twelve thousand dollars ($12,000), for the use and benefit of the said F. M. Murphy, the president and chief officer of the said Development Company, and as representing the stockholders and bond holders of the said Development Company; and that the said Development Company and the said F. M. Murphy, as the real parties in interest in said purchase at such foreclosure sale, are now negotiating for the sale of all of said mining properties and said shares of stock of said Railroad Company and said Smelting Company, and have made and entered into some character of agreement with the American Smelting & Refining Company, a corporation organized under the laws of New Jersey, and transacting business in Pima County, Arizona, for the sale to the said American Smelting & Refining Company of all of said mining properties and said shares of stock, and that the said Smelting & Refining Company is now in possession of said properties and working upon the same.

XIII

"That on July 5, 1911, a petition in bankruptcy was

filed against the said Copper Company, in the then District Court of the First Judicial District of the Territory of Arizona, by certain creditors, and thereafter on July 25, 1911, the said Copper Company was duly adjudged a bankrupt; and that thereafter and prior to the first meeting of the creditors on August 12, 1911, the following claims were filed in said bankruptcy proceeding:

(List of Claims, Transcript pp 13 to 16).

"That all of the above mentioned claims have been allowed by the Referee in Bankruptcy of said proceeding, excepting the claim of El Tiro Copper Company and the Arizona Southern R. R. Co., making a total of claims allowed in said bankruptcy proceeding, of the sum of $1,280,686.22.

XIV

"That at the first meeting of the creditors in said bankruptcy proceedings on or about August 12, 1911, M. P. Freeman was elected Trustee, and acted as such until on or about July 2, 1914, at which time he resigned and plaintiff was duly elected and qualified as such Trustee.

XV

"Plaintiff is informed and believes and upon such information and belief alleges, that there was some character of agreement between the said Development Company and the said Murphy as the president and chief officer thereof, and the creditors of said estate, that said bankruptcy proceedings should lie dormant, and that the said Development Company and the said Murphy

should be allowed time within which to re-finance and rehabilitate said mining properties to enable the said Development Company and the said Murphy to raise sufficient funds with which to liquidate and pay off and discharge said debts; and that in pursuance of said agreement, and relying upon the representations and promises so made by the said Development Company and the said Murphy, the said creditors did allow said bankruptcy proceedings to lie dormant, up until some time in 1914, and until the election and qualification of plaintiff herein as such Trustee; and that any seeming delay in the institution of this action was caused by the said Development Company and the said Murphy themselves; and plaintiff further alleges that he is informed and believes and upon such information and belief alleges, that the said Development Company and the said Murphy controlled the said bankruptcy proceedings during all of said time and up until plaintiff herein was elected and qualified as such trustee.

XVI

"That the action of the said Development Company in causing all the said mining properties and the said shares of stock in the said Railroad Company and the said Smelting Company to be so sold under said foreclosure proceedings, resulted in stripping the said Copper Company of practically all of its assets, with the exception of some personal property situated at said mines, which said personal property plaintiff as such trustee caused to be advertised for sale at public auction, after due and legal notice, and that the only bid received

therefor was a bid in the sum of five hundred dollars ($500) made by George W. Dietz of Tucson, Pima County, Arizona, and he has not been able to obtain any other bid for said personal property, at private sale, than the sum of fourteen hundred dollars ($1400).

XVII

"That there has not been sufficient moneys or property come into the hands of plaintiff, as such trustee of said estate, with which to pay any dividends upon the claims so filed and allowed by the Referee in Bankruptcy in said proceedings, as hereinbefore set forth.

XVIII

"That by reason of the matters and things herein set forth, plaintiff is advised and informed, and therefore alleges, that the said Development Company of America, the defendant herein, became and is liable for all of the debts of the said Copper Company, and as filed and allowed in said bankruptcy proceedings, amounting to the sum of one million, two hundred eighty thousand, six hundred eighty-six and 22-100 dollars ($1,280,-686.22), with interest thereon at the rate of six per cent per annum from the date of said allowance; and that all of said mining properties, and the said shares of stock of the said Railroad Company and of the said Smelting Company, so purchased at such foreclosure sale by the said Development Company of America, or for its use and benefit, are liable for all of said debts."

Plaintiff prayed for relief as follows:

"1 That plaintiff have and recover judgment against the defendant, the said Development Company of America, for the said sum of one million, two hundred eighty thousand, six hundred eighty-six and 22-100 dollars ($1,280,686.22), the amount of the debts so filed and allowed in said bankruptcy proceedings, with interest at the rate of six per cent per annum from the date of such allowance.

"2 That plaintiff have judgment decreeing that all of said mining properties and the said shares of stock of said Railroad Company and said Smelting Company are liable for the claims of the creditors of said Copper Company, as filed and allowed in said bankruptcy proceedings.

"3 That the claims of the said creditors of the said Copper Company be decreed and declared to be liens upon all the right, title or interest in and to said properties acquired by the said Development Company under and by virtue of said foreclosure proceeding.

"4 That all of the said mining properties and the said shares of stock be decreed to be a part of the assets of the said Imperial Copper Company, bankrupt; that the jurisdiction of plaintiff as Trustee of said Imperial Copper Company, bankrupt, be extended to the same and that the said properties be administered upon by plaintiff as such Trustee.

"5 And for alternative relief: that the defendant, the said Development Company of America, be required

and ordered to pay over to plaintiff all sums of money derived or to be derived by it from any sale or sales of any of said properties, to the extent of the said indebtedness and claims so filed and allowed against the said Copper Company, bankrupt.

"6 And for any other, further, special or general relief, in the premises, as to the Court may seem meet and proper, and for costs."

The motion of defendant directed against this complaint is as follows:

"And said defendant, without waiving its foregoing motion to dismiss for want of jurisdiction, but if the same be overruled, further answering the said bill of complaint, alleges, that the said bill of complaint upon its face discloses an insufficiency of fact to constitute a valid cause of action in equity; and that the plaintiff has not alleged in said bill of complaint facts sufficient to constitute any valid cause of action in equity, in law or otherwise against this defendant, or any cause of action whatsoever.

"Wherefore defendant prays that said bill of complaint be dismissed."

(Transcript, p. 23.)

This motion was sustained by the District Court and the cause dismissed.

(Transcript, pp. 38-39.)

The motion to dismiss for want of equity or for insufficiency of facts to constitute a valid cause of action in equity, admits as true all allegations of the bill well pleaded, and in substance says that admitting the facts to be true, the plaintiff cannot recover.

We do not deem it necessary to cite any authorities in support of this well known rule.

The rule with respect to demurrers before the adoption of the New Equity Rules abolishing demurrers and pleas was that:

If plaintiff was entitled to any kind of relief the demurrer for want of equity would be overruled.

Or, stating it in another way, the demurrer for want of equity would be overruled unless it appeared that under no possible state of the evidence a decree could be entered.

We assume that this rule will be followed by courts of equity in passing upon motions to dismiss for want of equity.

Therefore, if the plaintiff was entitled to any kind of relief whatever under the allegations of the bill, the motion to dismiss for want of equity should have been overruled.

On the Question that a parent company is liable for the debts of its subsidiary, agent, or instrumentality, we submit the following authorities:

Interstate Telg Co v B & O Telg Co, et al, 51 Fed 49:

This was a creditors suit brought by the Interstate Telegraph Company against the B & O Railroad Company, seeking to make it liable for a judgment theretofore obtained by the Interstate Telegraph Co. against the subsidiary company, the B & O Telegraph Company. The court held that the parent company was liable for the debt of the subsidiary or agent.

The case was affirmed in 54 Fed 50, by the Circuit Court of Appeals, Fourth Circuit, which court, in its opinion, among other things, said: "It is difficult to fix the exact relation between these two companies, whether the railroad company exercised its control as the sole stockholder, that is to say as the only person having a beneficial interest in its stock, or whether as the principal controlling its agent, or whether the telegraph company was one of the bureaus or departments of this great railroad system for which a charter of incorporation had been obtained simply for convenience; or whether it exercised control as lessor over its lessee, or whether as creditor over its debtor."

Bridgens vs Dollar Savings Bank of Kansas City, et al, 66 Fed 12:

It is a settled rule of equity jurisprudence that the directors and agents of two companies are disqualified from representing both companies in a transaction where the interests of the two companies are opposed, nor will one corporation be permitted to form a company ancilliary to the original one and contract with it to the disadvantage of the creditors and stockholders of one of the companies.

Morowitz on Private Corporations, Secs 529-530:

"And a court of equity will in such case, notwithstanding the apparent legality of such transfer or transaction between two such corporations, try the same according to the real facts and equities of the case.

Citing:

McVicker v Opera Co, 40 Fed 261.

Interstate Tel Co v B & O, etc, 51 Fed 549, supra.

Trust Co v Kneeland, 138 U S 414.

Day v Postal Tel Co, (Md) 7 Atl 608.

In re Watertown Paper Co, 169 Fed 256:

"There is, as the appellees point out, a line of cases holding that when one corporation creates another corporation for a particular purpose and holds all of its stock, the latter will be treated as the agent of the former, or as an instrumentality for carrying out its

purposes. In these cases the controlling corporation has been held liable for the debts of the subordinate company." Also citing Interstate Tel Co vs B & O, etc, supra.

Joseph R Foard v State of Maryland, for the use of Gorlaski, etc, CCA, 219 Fed 827:

"The District Court was clearly right in holding untenable the position taken by the Foard Company that the loading was done by the General Stevedoring Company as an independent contractor, and that it alone was responsible for any negligence in handling the dynamite. Whatever may have been the original design when the Foard Company caused to be organized the General Stevedoring Company the evidence leaves no doubt that the stevedoring, whether done under one or the other corporate names, was in reality but a department of the Foard Company as ship brokers and agents. The two companies had the same officers. The Stevedoring Company handled no funds except through the Foard Company. Its losses were paid by the Foard Company and dealt with as though they were that company's own losses. There are other like circumstances but these are sufficient to show that the Stevedoring Company was organized and controlled and its affairs so conducted as to make it a mere instrumentality of the Foard Company. This being so the two corporations must be regarded, as to the outside public, identical." Also citing Interstate Tel Co vs

B & O etc, Supra; In re Watertown, Supra: Chicago etc v Myers, 168 Ill 139, 48 N E 66.

Nicholson v A T & S F Ry Co (Kansas), 147 Pac 1123:

This was a case where an employee was injured while working on a branch line of railroad which branch was owned by a separate corporation, The Dodge City & Cimarron Valley Railroad Company, which was created by the A T & S F Ry Co for the purpose of building and operating said branch line. The court held that the branch company was a mere instrumentality of the Santa Fe Company. To be more plain the Dodge City & Cimarron Valley Company was a mere ledger heading in the Santa Fe Company's system of accounting, which did not break the relation of master and servant existing between the plaintiff and defendant when plaintiff was placed in charge of the construction train.

Linn & Lane Timber Co v U S, (CCA 9 Cir) 196 Fed 593:

The doctrine of separate legal entity of a corporation as distinct from its members cannot be invoked in a court of equity to cover a fraud, but in such cases the court will look beyond the corporate form to the purpose of it, and whatever would be binding upon the members composing it will be held binding upon the corporation.

And cases cited.

Cook on Corporations, 7th Ed Sec 663, p 2139:

"And where a bankrupt partnership owns the entire capital stock of a corporation the bankruptcy court will consider the corporation as merely an agent of the partnership and will extend its jurisdiction over its property and determine in the bankruptcy proceedings the respective rights of the creditors of both concerns." Citing in re Rieger, 157 Fed 609.

In re McCarthy Port Elevator Co, 196 Fed 247-251:

"A corporation is a legal entity and ordinarily will be treated as distinct from its membership. But a court of equity will look beyond this technical doctrine of existence independent of its shareholders when the rights of the parties require it." Citing Morowitz on Private Corporations, 2nd Ed, Secs 1,227 and 229.

Cornell v Corbin, 64 Cal 197-200:

Where several persons owned a mine and a corporation was organized to which the mine was conveyed, the Supreme Court of California held that the corporation was formed as a mere agency in carrying out the agreement between the parties. The court said: "In cases like the present a court of equity reaches beyond the form and shadow of things and grasps the substance. In this case the formation of the corporation was a part

of the transaction at its inception and its existence was used to carry out the plan. We can repeat with reference to the facts of this case what was said by this court with reference to the facts in Short v Baudry, 56 Calif 446, that the corporation was formed as a mere agency for more conveniently carrying out the agreement between the parties is sufficiently apparent. The relation which the corporation sustained to Cornell, Hardy and Corbin was substantially, if not technically that of trustee.

Shorb v Beaudry, 56 Calif 446:

Where several parties owned land and water rights and agreed among themselves to purchase and acquire other lands and water rights, they agreed to incorporate a company and to convey and to procure to be conveyed lands and water rights to the corporation. The Court held that the corporation was formed as a mere agency for more conveniently carrying out the agreements between the parties.

Hunt v Davis, (Calif), 66 Pac 957:

Where two individuals organized a corporation to run a newspaper, the court held that the corporation was a mere agency for more conveniently carrying out the agreements of the parties, following Shorb v Beaudry.

Kelly vs Ning Young Beneficial Assn. (Cal) 84 Pac 321:

The defendant was a corporation composed of Chinese persons in San Francisco and it caused a subsidiary corporation to be organized to own and hold a cemetery, owning all of its stock, etc, Held that the defendant, the parent company was liable for services performed by an attorney for the subsidiary company.

Clere Clothing Co v Union Trust & Savings Bank.

In re Prager-Schlfsinger Company's estate, (CCA 9th Cir) 224 Fed 363:

Two cases.

Holding that where one corporation owns and controls all of the stock of another, that the parent company is liable for the debts of the subsidiary corporation. Citing in re Muncie Pulp Co. 139 Fed 546.

See also:

In re Muncie Pulp Co 139 Fed 546.

Day v Postal Tel Co, 66 Md 354, 7 Atl 608.

In re Horgan, 97 Fed 319.

Cole v Price, 22 Wash 18.

In re Rieger etc, 157 Fed 609.

Cook on Corporations, 7th Ed, Vol 3, p 2432, Sec 709.

Same, Vol 3, p 2139.

In re McCarthy, 196 Fed 251.

In re Southwestern Bridge & Iron Co, 133 Fed 568.

In re Boston H & E RR Co, 9 Blatchford 109, Fed case 1677.

Salt Lake Val. Can. Co. et al v Collins, CCA 9th Cir, 176 Fed 91.

In re Alaska Am. Fish Co. et al 162 Fed 498.

Colonial Trust Co v Montello Brick Wks, CCA, 172 Fed 312-313.

Applying the principle so announced by the overwhelming weight of authority to the facts as alleged in the bill, it follows that the Development Company, the parent company of the Copper Company, was and is liable for all of the debts of the Copper Company.

We contend also, that the bill states facts sufficient to entitle plaintiff as trustee in bankruptcy of the copper company, to recover, as a part of the assets of the bankrupt estate, whatever interest the Development Company may have acquired in the properties described in the complaint, under the foreclosure proceedings.

Western Union Tel. Co., v. United States & Mexican Trust Co., et al., C. C. A. 221 Fed 545.

And cases therein cited.

Can the action be maintained by the Trustee in Bankruptcy of the Copper Company?

Appellee will no doubt contend that it cannot and that the action can only be maintained by the creditors themselves and by separate actions on each one of their claims.

As a general rule the prima facie presumption is always in favor of a plaintiff's right and capacity to sue until something is properly averred against it.

Enc P & P, Vol 15, p 471.

This action is brought by the trustee in bankruptcy for the benefit of the creditors of the Copper Company, bankrupt, the names of the creditors and amounts of their respective claims being set forth in the bill, (transcript pp 13 to 16) and the fruits of the recovery belong to the bankrupt estate to be applied towards the payment of the claims of the creditors.

It is an equitable action growing out of the relationship existing between the bankrupt and the Development Company, and is such an action as cannot be maintained by the creditors.

The trustee is the proper party and the only party to bring the suit.

If the bankruptcy of the Copper Company had not intervened the creditors could have maintained such an action, and the Copper Company would have been a necessary party to any such action instituted by the creditors. But, upon the bankruptcy of the Copper

Company, no action of any kind could be commenced or maintained against the Copper Company, because bankruptcy arrests all such proceedings, and the only thing the creditors could do was to file their claims in the bankruptcy proceedings.

The Bankruptcy Act, Sec 47a, provides that such trustees "as to all property in the custody or coming into the custody of the bankruptcy court shall be deemed vested with all the rights, remedies and powers of a creditor holding a lien by legal or equitable proceedings thereon; and also, as to all property not in custody of the bankruptcy court, shall be deemed vested with all the rights, remedies and powers of a judgment creditor holding an execution duly returned unsatisfied."

By Sec 67b of the Bankruptcy Act it is provided: "Whenever a creditor is prevented from enforcing his rights as against a lien created, or attempted to be created by his debtor, who afterwards becomes a bankrupt, the trustee of the estate of such bankrupt shall be subrogated to and **may enforce such rights of such creditor for the benefit of the estate."**

The trustee is really subrogated to the rights of the creditors.

Collier on Bankruptcy, 9th Ed, p 941, et seq:

"The majority of cases under the law of 1867 held that, since the bankruptcy arrests proceedings in the

state courts, the assignee (trustee), as the representative of the whole body of creditors, could bring any of that class of equitable actions where the existence of a judgment and execution returned unsatisfied are necessary elements; i. e., that he was in effect, if not in name, a judgment creditor."

"RULE UNDER THE PRESENT ACT—The rule formerly existing has been applied under the present act. This seems justified in view of the words, 'May enforce such rights of such creditor for the benefit of the estate.' ".

Loveland on Bankruptcy, 4th Ed, 1057:

"The trustee, as representing the bankrupt's creditors, is the proper party plaintiff in suits to recover property for the estate."

"The right to bring suits to collect and recover property is expressly given to the trustee by the Act."

In re Crystall Bottling Co, 96 Fed 945:

This was a case where the trustee was seeking to collect from the stockholders of the bankrupt corporation balances due on stock subscriptions for the benefit of the creditors. The court said that the trustee had a right to issue a call upon the stockholders for the amount due upon their subscriptions to the amount necessary to pay the deficiency on the claims, and ordered the call

enforced by suit brought by the trustee in the United States Court.

The court also said that this was such a suit as could not be brought by the bankrupt corporation but could be brought by the trustee, and that there could be one suit in equity for the adjustment of the whole matter. Citing Scovill v Thayer, 105 U S 143, 26 L Ed 968; and Patterson v Lind, 106 U S, 519, 27 L Ed 265.

In re Bothe, CCA, 173 Fed 597:

A trustee in bankruptcy stands for and represents all persons interested in the estate of the bankrupt.

Babbitt v Read, CCA, 173 Fed 712:

In which it is held that the right of the corporation to enforce a liability of its stockholders for the purpose of paying its debts passed to the trustee.

Trustees of the Mutual Building Fund & Dollar Savings Bank v Bossieux et al, 3 Fed 817:

This was a case under one of the old bankruptcy acts in which the point was raised directly by demurrer that the trustee in bankruptcy did not have the authority to bring or maintain the suit. The court overruled the demurrer and held that the trustee had a right to maintain the action because the fruits of the recovery belonged to the estate for the benefit of the creditors. This decision is based upon good and sound reasoning.

In re Newfoundland Syndicate, 196 Fed 443:

This was a suit brought by the trustee of a bankrupt to enforce a statutory liability upon stockholders for the full par value of the shares for the benefit of the creditors.

Skillin v Magnus et al, 162 Fed 689:

This was a suit by a trustee in bankruptcy to recover unpaid subscriptions to the stock of the corporation.

Held that such a suit could be maintained by the trustee and could not be maintained by the bankrupt.

Courtney v Fidelity Trust Co, CCA, 219 Fed 57-64:

While this case is not directly in point, it holds: "It has been frequently decided that creditors' rights which are enforcible under state statutes accrue to a trustee in bankruptcy, although such rights are not available to him under the limitations of the Bankruptcy Act."

Other cases:

In re Miller Elec Co, 111 Fed 515.

In re Eureka Furn Co, 170 Fed 485.

Equity Rule 37 (New Equity Rules 1912) provides:

"Every action shall be prosecuted in the name of the real party in interest, but an executor, administrator, guardian, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party expressly authorized by statute, may sue in his own name without joining with him the party for whose benefit the action is brought."

This equity rule, it seems to us, gives the trustee the right to sue.

The familiar rule against multiplicity of suits would also seem to be applicable to the question. It appears from the bill that there are thirty-six creditors of the bankrupt copper company, the largest being for the sum of $725,966.43, and the smallest for $70.15, necessitating thirty-six separate suits if the creditors are required to bring the suits in their own names.

It certainly will not be contended by Appellee that a recovery by the trustee in this action against the Development Company, for the benefit of the estate and the creditors, would not be a complete bar to any action that might be instituted against the Development Company by the individual creditors to recover on the same cause of action.

This alone ought to dispose of the question.

First and second assignments of error.

As pointed out hereinbefore, the defendant filed at

the same time and as one paper, its motion to dismiss for want of jurisdiction, motion to dismiss for want of equity, plea in bar and answer to the merits. (Transcript pp 22 to 38).

Defendant did not specify in its answer that it did not waive its motion to dismiss for want of equity. It did, however, specify that it did not waive its motion to dismiss for want of jurisdiction. (Transcript, p 30).

We now contend, as we did below, that defendant, by filing its answer at the same time as filing its motion to dismiss for want of equity, and as one paper, waived its motion to dismiss for want of equity.

Equity Rule No 29, Hopkins New Federal Equity Rules, p 162.

Simpkins Federal Suit in Equity, p 436.

Strang v Richmond P & C R Co et al, CCA, 101 Fed 511.

In re Cooper Bros, 159 Fed 956.

Sage Land & Imp Co v Ripley, CCA, 192 Fed 785-787.

Defendant's motion to dismiss for want of jurisdiction was waived in the court below. At any rate, as we understand the law, there was no merit in the motion. The complaint shows requisite diversity of citizenship and amount involved in excess of $3000.00.

In conclusion we earnestly insist that the decree of the District Court sustaining defendant's motion to dismiss for want of equity and dismissing the action should be reversed with directions to the District Court that said motion be overruled.

Respectfully submitted,

FRANCIS M. HARTMAN,

EDWIN F. JONES,

Attorneys for Appellant.

No. 2822

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

JOHN H. MARTIN, as Trustee in Bankruptcy of the IMPERIAL COPPER COMPANY, a corporation, Bankrupt,

Appellant,

vs.

THE DEVELOPMENT COMPANY OF AMERICA, a corporation,

Appellee.

Filed
SEP 29 1916
F. D. Monckton
Clerk

BRIEF ON BEHALF OF APPELLEE.

EVERETT E. ELLINWOOD,
JOHN M. ROSS,
LESLIE C. HARDY,
Solicitors for Appellee,
Bisbee, Arizona.

Arizona Daily Star, Law Printers, Tucson, Arizona

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

JOHN H. MARTIN, as Trustee in Bankruptcy of the IMPERIAL COPPER COMPANY, a corporation, Bankrupt,

Appellant,

vs.

THE DEVELOPMENT COMPANY OF AMERICA, a corporation,

Appellee.

STATEMENT OF THE CASE

This appeal involves the validity of an order of the District Court of the United States, for the District of Arizona, granting defendant's (appellee's) motion to dismiss the bill of complaint, for the reason that it is insufficient of fact to constitute a valid cause of action in equity.

The bill of complaint was filed by appellant, as trustee of the Imperial Copper Company, bankrupt, an Arizona corporation (hereinafter called "Copper Company"), against The Development Company of America, a Delaware corporation (hereinafter called "Development Company"). It alleges that the appellee, Development Company, caused the appellant, Copper Company, to be organized, on, or about, May 11, 1903, as the "auxiliary, subsidiary, branch,

agent and instrumentality" of the Development Company, to carry into effect a certain contract executed by the Development Company for the purpose of operating and developing certain mining properties, of the value of five hundred and fifteen thousand ($515,000.) dollars, situated at Silver Bell, Pima County, Arizona; that the directors and officers of the Development Company were practically the same as those of the Copper Company; and that the Development Company owned practically all of the capital stock of the Copper Company.

It further alleges that the Development Company also caused to be organized, under the laws of Arizona, in the year 1903, or 1904, two "dummy" corporations, known as the Arizona Southern Railroad Company and the Southern Arizona Smelting Company (hereinafter called "Railroad Company" and "Smelting Company," respectively), in furtherance of its business of operating and developing said mining properties, and caused all of the capital stock of said Railroad Company and said Smelting Company to be issued to the Copper Company.

That the Development Company, in 1903, caused the Copper Company to execute a first mortgage, or deed of trust, upon said mining properties to secure a two million dollar bond issue of the Copper Company, for the use and benefit of the Development Company, and that the last named company used the stock of the Copper Company, and the proceeds of the sale thereof, in its business of purchasing, developing and operating mining and smelting properties in Arizona, and caused the capital stock of the Railroad Company and Smelting Company, theretofore transferred to the Copper Company, to be subjected, as additional security, to the lien of said mortgage or deed of trust executed by the Copper Company.

That the Development Company, on July 3, 1911, being at that time a holder of a majority of the bonds and capital

stock of the Copper Company, caused a suit to be instituted in the District Court of the First Judicial District of the Territory of Arizona at Tucson, Arizona, to foreclose said mortgage or deed of trust upon said mining properties of the Copper Company, and said capital stock of the Railroad Company and Smelting Company theretofore transferred by said last named companies to the Copper Company. That, under a decree of foreclosure, said properties were sold March 31, 1915, to Leo Goldschmidt, for the sum of ninety thousand ($90,000.) dollars for said mining properties and twelve thousand ($12,000.) dollars for said capital stock, for the use and benefit of the Development Company, or for the use and benefit of F. M. Murphy, president and chief officer of the Development Company, as representing the stockholders and bondholders of that company. That the said Murphy and the Development Company are now negotiating for the sale of said mining properties and the said capital stock, so purchased at said foreclosure sale by the said Goldschmidt, to the American Smelting & Refining Company, a New Jersey corporation.

That a petition in bankruptcy was filed against the Copper Company on July 5, 1911, in the District Court of the First Judicial District of the Territory of Arizona, by certain of its creditors, and on July 25, 1911, it was duly adjudged a bankrupt, and, at the first meeting of the creditors of said bankrupt, held on or about August 12, 1911, M. P. Freeman was elected as trustee, and acted as such until on, or about, July 2, 1914, he resigned, at which time appellant was duly elected, and qualified, as trustee in bankruptcy of the Copper Company. That the creditors' claims, filed and allowed in the bankruptcy proceedings of the Copper Company, total the sum of one million two hundred eighty thousand six hundred and eighty-six and 22/100 ($1,280,686.22) dollars.

That the action of the Development Company, in causing

said mining properties and said capital stock to be sold under said foreclosure proceeding, resulted in stripping the Copper Company of practically all its assets, with the exception of some personal property situated at the mines of the Copper Company, which the trustee caused to be advertised for sale at public auction; that insufficient moneys or property have come into the hands of plaintiff, as trustee in bankruptcy of the Copper Company, to pay any dividends upon the claims filed and allowed by the referee in bankruptcy.

That the appellee, Development Company, became, and is liable, for all of the debts of the appellant, Copper Company, as filed and allowed in the bankruptcy proceeding, amounting to the sum of $1,280,686.22, with interest at the rate of six per centum per annum from the date of allowance, and that said mining properties and said capital stock of the Railroad Company and the Smelting Company, purchased at said foreclosure sale by the Development Company, or for its use and benefit, are liable for all of said debts of the bankrupt Copper Company.

For these reasons the appellant, as trustee in bankruptcy of the Copper Company, asks for the following relief:

(1) For judgment against the *Development Company* in the sum of $1,280,686.22, the amount of the allowed creditors' claims in the bankruptcy proceedings of the Copper Company, with interest thereon at the rate of six per centum per annum.

(2) For judgment decreeing that said mining properties and said capital stock of the Railroad Company and the Smelting Company, pledged by the Copper Company as part security for said deed of trust, are liable for said creditors' claims.

(3) For judgment decreeing said creditors' claims to be liens upon the right, title or interest in, and to said mining

properties, and said capital stock acquired by the Development Company at said foreclosure sale.

(4) For judgment decreeing said mining properties and said capital stock of the Railroad Company and Smelting Company to be a part of the assets of the Copper Company to be administered upon by appellant, as trustee in bankruptcy of said Copper Company.

(5) For judgment decreeing that the Development Company pay over to appellant, as trustee in bankruptcy of the Copper Company, all moneys derived from the sale of any of said mining properties or said capital stock, to the extent of said creditors' claims.

(6) And for such special or general relief as may seem meet and proper in the premises.

ARGUMENT.

ASSIGNMENT OF ERRORS I AND II.

Appellant's first and second assignment of errors are directed to the order, judgment and decree of the lower court dismissing the bill of complaint upon the grounds of its insufficiency of fact to constitute a valid cause of action in equity, for the reason that defendant filed its motion to dismiss and answer at the same time.

By making this assignment of errors appellant evidently overlooks the provisions and manifest purpose of Equity Rule No. 29. It is there provided:

> "Every defense in point of law arising upon the face of the bill, whether for misjoinder, nonjoinder, or insufficiency of fact to constitute a valid cause of action in equity, which might heretofore have been made by demurrer or plea, shall be made by motion to dismiss, *or in the answer*, * * * *"

While defendant filed its motion to dismiss and answer, simultaneously, they are, nevertheless, separate pleadings. (Tr. of Rec. p. 22, *et seq.*) The answer specifically disclaimed any waiver of the motion to dismiss. Regardless of this, however, the defenses urged in the motion to dismiss

might have been urged in the answer, under Equity Rule No. 29, *supra.* It seems strange for appellant to argue that a rule, which permits a defendant to plead a defense of law in the motion to dismiss, *or answer,* does not permit a defendant to plead such a defense in the motion to dismiss, if an answer is also filed.

It is true that former Equity Rule No. 32 did not permit a defendant to demur, and plead to, and answer the bill at the same time, but present Equity Rule No. 29 abolishes pleas and demurrers, so we assume that the strict methods of interposing such pleas were abolished with them. The present equity rules were promulgated in order to liberalize the equity practice, so we take it that a motion to dismiss and answer, filed simultaneously, not only comports with the spirit, but the letter of Equity Rule No. 29, even though they were filed as separate pleadings. This must be true, if a defense of law may be presented by a motion to dismiss, or, at the option of the pleader, in the answer.

ASSIGNMENT OF ERRORS III AND IV.

Appellant's third and fourth assignment of errors are directed to the order, judgment and decree of the lower court holding the bill insufficient of fact to constitute a valid cause of action in equity. Both these assignments of error are so interrelated that they may be discussed, and disposed of, conjointly.

The bill of complaint cannot be sufficient of fact to constitute a valid cause of action in equity, unless the facts alleged disclose that the Development Company is liable for the debts and defaults of the bankrupt Copper Company. This is true, because the relief is asked against the Development Company. This liability, if any, results from the sole fact that the Development Company owns "practically all" of the capital stock of the Copper Company, elects its officers, controls and directs its affairs. So, the real question presented by the bill of complaint is this:

Does the mere fact that the Development Company owns "practically all" of the stock, and thereby controls the Copper Company, subject the former to a liability for the debts of the latter? An answer to this question naturally requires a discussion of the responsibility of a holding company for the liability of its subsidiary company, for such is the alleged relationship existing between the Development Company and the Copper Company.

THE DEVELOPMENT COMPANY, AS A HOLDING COMPANY OF THE COPPER COMPANY, IS NOT LIABLE FOR THE DEBTS AND DEFAULTS OF THE COPPER COMPANY UNDER THE FACTS PRESENTED BY THE BILL OF COMPLAINT.

From the allegations of the bill of complaint it will be observed that appellant, as trustee of the Copper Company, instituted his suit against appellee (Development Company), and asks, in effect, that the separate legal entity of those companies be disregarded upon the theory that the Copper Company was the mere "auxiliary, subsidiary, branch, agent and instrumentality" of the Development Company, so that the latter may be subjected to the payment of the debts of the bankrupt Copper Company, as evidenced by the approved claims allowed in bankruptcy against that company.

The fact that one corporation owns part, or all, of the stock of another corporation does not, *ipso facto,* make the one responsible for the debts and defaults of the other. If this were true it at once becomes apparent that the peculiar attribute of a corporation is destroyed, namely, the separate legal entity existing between the corporation and its stockholders.

It is said in *Cook on Corporations, Seventh Edition, Volume 1, Section 317,* as follows:

> "During the past ten years, there has sprung into existence a new kind of corporation, namely, a corporation organized not to do business itself, but to purchase

> and hold stock of other corporations, in order to secure harmony of control. * * * * The mere fact that a corporation is a separate entity is not conclusive in determining its relations with other companies. The courts have power to ignore the corporate existence, when such existence merely serves to conceal the truth. Nevertheless, it requires a strong case to induce a court of equity to consider two corporations as one, on account of one owning all the capital stock of the other."

It is not the purpose of the bill of complaint to subject the Development Company to the payment of debts which it contracted, but, on the other hand, to subject it to the payment of debts which the Copper Company contracted. There is nothing in the bill of complaint whatsoever which discloses that the creditors of the Copper Company considered the Development Company responsible for the former's indebtedness, or that they dealt with the Copper Company as a mere "auxiliary, subsidiary, branch, agent and instrumentality" of the Development Company. The debts of the Copper Company are all proved and allowed claims in the bankruptcy proceedings of that Company.

The authorities recognize the separate corporate existence between a holding company and its subsidiaries, and do not subject the one to the liabilities of the other, unless a strong case is made which discloses an exception to the general rule of separate corporate existence. This legal principle has been recognized and announced by many of the Courts. It is typically expressed by the Circuit Court of Appeals for the Sixth Circuit, in the recent case of *Pittsburg & Buffalo Co. v. Duncan et al., 232 Fed. 584,* decided May 2, 1916. That Court, speaking through Circuit Judge Knappen, said:

> "As respects stock ownership and corporate control: The mere fact that the stockholders in two or more corporations are the same, *or that one corporation exercises control over the other through ownership of its stock, or through identity of its stockholders,*

> *does not make either the agent of the other,* (italics ours) nor does it merge them into one, so as to make the contract of one corporation binding upon the other, where each corporation is separately organized under a distinct charter. (Citation of authorities.) True, the legal fiction of distinct corporate existence will be disregarded when necessary to prevent fraud, or when a corporation is so organized and controlled and its affairs so conducted 'as to make it only an adjunct or instrumentality of another corporation.' (Citation of authorities.) But 'it requires a strong case to induce a court of equity to consider two corporations as one, on account of one owning all of the capital stock of the other.' (Citation of authorities.)"

Again, this legal principle was announced by the Circuit Court of Appeals for the Second Circuit in the leading case of *In re Watertown Paper Co., 169 Fed. 252-256,* speaking through Circuit Judge Noyes, as follows:

> "Unless, therefore, it can be shown that some exception to the general rule of separate corporate existence and liability applies in this case, it must follow that the claim of the pulp company should have been allowed. The only exceptions to the rule, properly applicable here, are: (1) The legal fiction of distinct corporate existence may be disregarded when necessary to circumvent fraud. (2) It may also be disregarded in a case when a corporation is so organized and controlled, and its affairs are so conducted as to make it merely an instrumentality or adjunct of another corporation."

We use the foregoing excerpts, without stating the facts of the cases, merely to show the general rule touching upon the liability of a holding company for the debts of the subsidiary. It may be stated, generally, that a holding company is not liable for the debts of its subsidiary, except when necessary to circumvent fraud, or when the subsidiary is the mere instrumentality or adjunct of the other, *and*

then only in the clearest of cases. In view of the fact that there is no allegation of fraud in the bill of complaint we may eliminate from our discussion that exception to the general rule.

WAS, THEREFORE, THE DEVELOPMENT COMPANY (HOLDING COMPANY) RESPONSIBLE FOR THE DEBTS OF THE COPPER COMPANY (SUBSIDIARY COMPANY) BECAUSE THE LATTER WAS AN "AUXILIARY, SUBSIDIARY, BRANCH, AGENT AND INSTRUMENTALITY" OF THE FORMER?

Of course, the mere fact that the pleader alleges that the Copper Company was "an auxiliary, subsidiary, etc.," of the Development Company does not make it such. We are now dealing with the facts of the bill and not the pleader's conclusions.

The case of *In re Watertown Paper Co., supra,* is demonstrative of the application of the general rule and its exceptions. There the stockholders of the Watertown Paper Company organized a separate corporation and called it the H. Remington & Son Pulp & Paper Company. The stock of one was virtually owned by the stockholders of the other. The Pulp Company was financed, during its organization period, from funds of the Paper Company. The Paper Company became bankrupt, and the Pulp Company presented its claim for merchandise furnished by the Pulp Company to the Paper Company. The claim was rejected, as was stated, because there was such an identity of corporate interests that a claim presented by the Pulp Company against the Paper Company was nothing more or less than the bankrupt presenting a claim against itself. The Circuit Court of Appeals, in reversing the District Court, said:

> "It is true that the two corporations neglected their affairs. A creditor of one company might perhaps have a claim, based upon the principles of estoppel, against the other. Lax business methods are clearly shown.

> Undoubtedly the controlling stockholders regarded the two corporations as being, in a general way, different departments of their business. But the separate corporation organizations were apparently kept up. Each corporation had its own creditors, its own assets, and conducted its business in its own name. Books of account were kept, showing their financial relations. The stockholders were not entirely the same. We cannot, upon these facts, hold that the corporations were identical, nor that the Pulp Company was merely an adjunct or instrumentality of the Paper Company. Instead of coming under the exceptions, this case seems clearly to come within the general rule that the distinct corporate existence of two separate, although associated corporations, will be regarded by the courts."
>
> "For these reasons, we think the claim of the Pulp Company should have been allowed against the bankrupt estate of the Paper Company."

It is true that the identity of interests between the Paper Company and the Pulp Company was occasioned by similarity of individual stock ownership in the two companies, but we apprehend that there is no difference, in so far as the application of the principle of law is concerned, between two corporations whose stock is owned by virtually the same individual stockholders, and two corporations, the stock of one of which is owned by the other. The vital question, in both instances, when liability is involved, is the preservation or destruction of the legal fiction of separate corporate entity.

In the case which we have immediately quoted from, Judge Noyes discusses the principles of estoppel, arising from a debtor's liability created by one corporation holding itself out as responsible for the debts of another. Here, as there, this principle is inapplicable, because there is no allegation of the bill of complaint which discloses that the

Development Company ever held itself out as responsible for the debts of the Copper Company.

The case of *B. & O. Tel. Co. v. Interstate Tel. Co., 54 Fed. 51,* discloses that the Baltimore and Ohio Railroad Company organized several corporations to control and operate the Railroad Company's telegraph system. The corporations so organized by the Railroad Company were managed and controlled by it. The telegraph plant of the Baltimore and Ohio Telegraph Company of Baltimore County, one of the telegraph companies so organized, was sold by the Railroad Company to the Western Union Telegraph Company. Thereafter the Interstate Telegraph Company obtained a judgment against the Baltimore and Ohio Telegraph Company, and execution was issued on the judgment and returned *nulla bona.* Whereupon, suit was instituted against the Baltimore and Ohio Railroad Company and judgment obtained for a restitution of the debt of the Baltimore and Ohio Telegraph Company. The Baltimore and Ohio Railroad Company had sold the property of the Baltimore and Ohio Telegraph Company and thereby stripped it of its assets in disregard of its creditors, and the proceeds of the sale were "received and appropriated" by the Baltimore and Ohio Railroad Company. This fact, as appears from the opinion, at page 52 of the Reporter, undoubtedly gave rise to the following language of the Court:

> "When, therefore, the Baltimore and Ohio Railroad Company took possession of, controlled and *appropriated this property and its proceeds it took them impressed with these trusts, and is bound by them.* (Italics ours.) This result follows, whether it acted as sole beneficial owner of all its stock, or as creditor who had made large advances, or as principal who had placed large and valuable asets in the hands of its agent, as ostensible owner, *and thus secured its credit.* (Italics ours.) * * * *"

Certainly, the Baltimore and Ohio Railroad Company

was liable to the Interstate Telegraph Company for the debts of its subsidiary, the Baltimore and Ohio Telegraph Company, because the first company sold the property of the last company and received and appropriated the proceeds of the sale to its own use. These proceeds were impressed with pre-existing debts, so as to constitute a trust fund for the payment thereof. But the Development Company, in the case at bar, received no moneys from the judicial sale of the property held by the Copper Company. Indeed, the property described by the bill of complaint was *judicially* sold to satisfy a debt of the Copper Company, and the proceeds of the sale were applied towards a discharge of that debt. All of the proceedings had in connection with the sale of the properties held by the Copper Company were of a judicial character, the validity of which, we submit, has been finally determined by the Supreme Court of Arizona in the case of *Martin v. Bankers' Trust Company, 156 Pac. 87.*

The case of *In re Muncie Pulp Co. 139 Fed. 546,* would, from a superficial examination, seemingly support appellant's theory upon which his bill of complaint is framed. A careful examination of the facts of that case, however, will disclose that it falls within one of the recognized exceptions to the general rule of separate corporate existence. The opinion discloses that the Muncie Pulp Company, a New York corporation, was engaged in manufacturing pulp at Muncie, Indiana, its stock being owned by Henry Blackman, as president, and Gustav Jaeger, as treasurer. Thereupon, the Pulp Company organized, under the laws of Indiana, the Buck Creek Natural Gas Company to furnish the Pulp Company with gas and oil. Thereupon, and for technical reasons, a new company, known as the Great Western Gas and Oil Company, was organized to take the place of the Buck Creek Company, Blackman, as president, holding fifty-three per cent of its stock, and Jaeger, as treasurer,

holding forty-seven per cent of its stock. To the Great Western Gas and Oil Company was transferred the gas and oil well property, formerly owned by the Pulp Company, and by it transferred to the Buck Creek Company. Various expenditures were made by the Pulp Company for the Great Western Company, the former treating the latter merely as an agent, "which the law made necessary for the full development of its business." The Great Western Company kept no separate books, its entire administration being under the control of the Pulp Company. The record failed to show that there were any creditors of the Great Western Company. On December 16, 1914, the Muncie Pulp Company was adjudicated a bankrupt, and, thereupon, the receiver of the Pulp Company presented a petition to the District Court for the Southern District of New York, praying that the Great Western Company turn over to him the property which had been transferred to it. The petition was granted, and the order of the Court in this respect was thereafter affirmed by the Circuit Court of Appeals for the Second Circuit. An excerpt from the opinion will be sufficient to distinguish the facts of that case from the one at bar. At pages 546 and 547 of the Reporter, Judge Coxe, speaking for the Court, said:

> "The Muncie Pulp Company made various expeditures of its own money for the benefit of the Great Western Company, treating the latter merely as an agent, *which the law made necessary for the full development of its business.*" (Italics ours.) "The Great Western Company kept no separate set of books, and its entire administrative department being under the control of the Muncie Company. *The record fails to show that there were any creditors of the Great Western Company.*" (Italics ours.)

The statement of facts by the Court discloses that the Great Western Company was simply an agent of the Mun-

cie Company, which the law made necessary for the full development of its business. Indeed, the subsidiary had no creditors. These facts admittedly brought the liability of the Muncie Pulp Company within the exceptions of the general rule.

Again the Court, speaking at page 548 of the Reporter, says:

> "The Great Western Company was undoubtedly a mere creditor of the Pulp Company, having no independent business existence and organized solely for the purpose of facilitating the business of the latter. The Great Western Company has no shadow of claim to the property in controversy, and to permit it, or its president, or stockholders, to dispose of such property, *is to sanction a fraud upon the creditors of the Pulp Company.*" (Italics ours.)

Thus, we ascertain the Great Western Company, by transferring the property sought to be subjected to the liabilities of the Muncie Pulp Company, would perpetrate a fraud upon the creditors of the latter company. Of course, fraud destroyed the separate, corporate entity existing between the two corporations. But, in the case at bar, as before stated, there is no allegation of fraud, hence the above case has no application.

The case of *In re Reiger, Kapper and Altmark, 157 Fed. 609,* discloses a situation where a partnership, in contradistinction to a corporation, owned ninety-nine per centum of the capital stock of the company. The partnership was involuntarily adjudged a bankrupt. An application was made to extend the partnership receivership to the corporate assets, because, as it was alleged, the corporation was a subsidiary of the partnership. The receivership was so extended, but the facts of the case disclose that it was a proper case to disregard the separate entity of the corporation. For instance, Sater, J., District Judge, at page 611, said:

> "The corporate organization, it is true, was main-

tained, but it was for the purpose of facilitating and benefiting the partnership business. It was a mere adjunct to the partnership. The partners acquired the corporate stock, made themselves directors of the corporation, and owned, operated and controlled both concerns, and used the corporation's trade mark on their bill heads. *They shared in the profits made and losses sustained by the company. These four men constituted themselves as partners a selling agency to dispose of their own manufactured product.*" (Italics ours.)

Certainly this statement of the District Judge reveals such an identity of interest between the partners and corporation that the one should have been liable for the responsibilities of the other. That the partnership and corporation mutually shared the profits and losses discloses the true relationship existing between them. Besides, the opinion further discloses that the scheme of operating the partnership and corporation was fraudulent in law, and hindered and delayed the creditors of the bankrupt estate in the pursuit of their legal remedies. No such situation is disclosed by the pleadings in the case at bar. Indeed, there is no attempt to justify the relief asked for here upon a plea of fraud.

The case of *Clere Clothing Company v. Union Trust & Savings Bank, 224 Fed. 363,* decided by this court, is illustrative of an application of the exceptions to the general rule of separate corporate existence. In that case the court refused to sanction a claim by the Clere Clothing Company against the Prager-Schlesinger Company, because the evidence disclosed that the latter company was created solely as the selling agent of the former, and, that in operating, both companies were virtually one. It was properly held by this court that such a scheme of organization would permit the Clere Clothing Company to prove debts against the Prager-Schlesinger Company in fraud of creditors. This

court, at page 366 of the Reporter, speaking through Judge Morrow, said:

> "We are of opinion that the evidence indicates conclusively that, commencing with the reorganization of the Prager-Schlesinger Company in July, 1912, down to and including the filing of the voluntary petition in bankruptcy by that company in August, 1913, it was acting solely in the capacity of agent for the Clere Clothing Company and that the presentation for payment of the claims involved in this proceeding is a deliberate attempt on the part of the latter company to prove debts against itself in fraud of legitimate creditors of the bankrupt corporation. The fact that the two companies preserved separate entities does not detract in the slightest degree from the force of the facts adduced in the testimony and hereinbefore referred to. The Clere Clothing Company and the Prager-Schlesinger Company, during the period referred to, were, as it were, one corporation. The scheme of the Clothing Company is easily discerned. It proposed to play safe regardless of the ultimate financial condition of the Prager-Schlesinger Company. If the latter company should be successful, there can be no doubt that the profits would have gone to the Clere Clothing Company, or to the National Bank of Commerce in payment of the indebtedness of the Clothing Company. If the Prager-Schlesinger Company should fail, as it did in fact fail, the Clothing Company proposed to be in a position to present and insist upon the payment of its alleged claims. Such tactics are not to be commended. A corporation may not for a period of over a year so intertwine its afairs and business transactions with a second company as to virtually create the relationship of principal and agent, and then upon the insolvency of the second company insist upon the payment of alleged debts incurred in the very transaction by which the relationship was created."

It is easy to discern that the present bill of complaint does not disclose such an identity of interest between the Development Company and the Copper Company as the

facts of the above case disclose between the Clere Clothing Company and the Prager-Schlesinger Company, and, besides, there the whole scheme of operation was considered a fraud upon creditors, a situation very much different from that disclosed by complainant's bill of complaint.

In the case of *Joseph R. Foard Company v. State of Maryland, 219 Fed 827,* the Circuit Court of Appeals for the Fourth Circuit had under consideration suits in admiralty by the State of Maryland to the use of Frances Goralski, et al., against the Joseph R. Foard Company, General Stevedoring Company, the Mayor and City Council of Baltimore City and the Munson Steamship Line; and also a suit in admiralty by Gustave Lies against the same respondents and the Maryland Steamship Company. All of the suits involved an accident arising out of an explosion on the British Steamship Alum Chine, lying in the quarantine anchorage off the port of Baltimore on the Patapsco River. Damages were adjudged to the libellants against the respondents, Joseph R. Foard Company, and the General Stevedoring Company. The Joseph R. Foard Company contended, both before the District Court and the Circuit Court of Appeals, that it was not liable but that the General Stevedoring Company, as an independent contractor, was alone responsible for the injury occasioned by the negligent handling of the dynamite which caused the explosion. But it was held that the General Stevedoring Company was merely the instrumentality of the Joseph R. Foard Company. This conclusion, however, rests upon the facts that the losses of the General Stevedoring Company were paid by the Joseph R. Foard Company, and all of the profits of the former company were kept by the latter company as a charge for managing its business; and, also, that the contract to load the vessel, upon which occurred the explosion, was made with the Joseph R. Foard Company, and that company made no separate contract with the General Steve-

doring Company. The following excerpts from the opinion readily discloses that the facts of that case are quite different from those disclosed by the allegations of the present bill. At page 829 of the decision, Judge Woods, speaking for the Court, said:

> "The District Court was clearly right in holding untenable the position taken by the Foard Company that the loading was done by the General Stevedoring Company as independent contractor and that it alone was responsible for any negligence in handling the dynamite. Whatever may have been the original design when the Foard Company caused to be organized the General Stevedoring Company, the evidence leaves no doubt that the stevedoring, whether done under one or the other corporate names, was in reality but a department of the business of the Foard Company as shipbrokers and agents. The two companies had the same officers; the Stevedoring Company handled no funds, except through the Foard Company; *its losses were paid by the Foard Company and dealt with as if they were that company's own losses. All of the profits of the Stevedoring Company were kept by the Foard Company as a charge for managing the business* . (Italics ours.) There are other like circumstances, but these are sufficient to show that the Stevedoring Company was organized and controlled and its affairs so conducted as to make it a mere instrumentality of the Foard Company. This being so, the two corporations must be regarded, as to the outside public, identical. (Citation of authorities.)
>
> *"But, even if the usual current of business of the two corporations has been separate, in this instance the contract to load the vessel was with the Foard Company, and the evidence tends to show that it made no separate contract with the Stevedore Company, but cooperated with and completely controlled it.* (Italics ours.) The two companies, therefore, will be treated as one in this discussion, to be referred to as the Foard Company."

This Court, in the case of *Linn & Lane Timber Company v. United States, 196 Fed. 593,* decided a suit in equity brought by the United States against the Linn & Lane Timber Company, Charles A. Smith, et al., to annul patents issued for certain lands entered under the Act of Congress, known as the Timber and Stone Act. The lands in question, alleged to have been fraudulently acquired, were conveyed to the Linn & Lane Timber Company, organized by the defendant, Charles A. Smith. That company pleaded that the suit could not lie against it, because it had not been commenced within six years from the date of the patents. This Court, however, treated Charles A. Smith and the corporation as being identical, and annulled the patents, upon the ground that the entire transaction was in fraud of the Government, a condition which brought the facts of that case within one of the exceptions to the recognized rule. This Court, speaking through Judge Gilbert, at page 597 of the Reporter, said:

> "But, assuming that the deeds were in fact delivered to the corporation at the time of its first meeting of its board, it is clear that it should be held, for the purpose of determining the question of the application of the statute of limitations, that Smith was the corporation and the corporation was Smith. He organized the corporation. He owned all the capital stock; he owned all of the lands. Before the corporation was organized and before the patents issued, he knew that the officers of the government were making investigation of the entries, and that there was talk of his indictment by a federal grand jury. The corporation was organized in Minnesota 'as a holding company' of lands in Oregon. Up to the time when the deeds were recorded, September 9, 1908, the corporation had never done any business, had never taken possession of the lands or exercised any act of ownership thereof, and there was nothing of record in any state or county office in Oregon to indicate that the corporation possessed any property in the state or had ever transacted any business there-

in. There can be no doubt that one at least of the purposes for which it was formed was to conceal fraudulently therein the titles to the lands which are the subject of this suit, and to keep the titles so concealed until the time when the statute of limitations should bar the anticipated suit of the government to set aside the patents."

Immediately following the quotation this court refers to decisions which hold that, when necessary, a court of equity will look beyond the corporate form and into the substance of things to discern the use of a corporation as a cloak for fraud, or for otherwise averting legal responsibilities. But, here again, we find fraud permeating the transaction, a situation dissimilar from the facts disclosed by the bill of complaint in the present case.

Upon the question, generally, of the liability of one corporation for the debts of another by virtue of stock ownership and control, see *Cook on Corporations, 7th Ed., Vol. 1, p. 934, Sec. 317, and Vol. 3, p. 2138, Secs. 663-664.*

DECISIONS CITED IN THE BRIEF OF APPELLANT.

Appellant has been kind enough to serve upon us copies of his brief in ample time for replying thereto. We have carefully read the brief and studied the cases cited therein, some of which have been used in the present brief for the purpose of justifying the action of the trial court in dismissing the bill for insufficiency of facts to constitute a cause of action. Unfortunately, appellant has used random quotations from a few of the decisions cited in his brief, without disclosing the facts thereof. It has been our purpose to select, for the enlightenment of the Court, those decisions which, in our opinion, were elucidative of the rule of law now involved. We have not hesitated to show that the courts, in proper cases, would disregard corporate entity, but it has been our purpose to show that none of the courts

have done so upon facts similar to those disclosed by the allegation of the complainant's bill of complaint.

Appellant has evidently concluded that courts of equity would hold one corporation liable for the debts of another merely by virtue of the fact that one corporation held a majority, or all, of the stock of another, and thereby controls its affairs. The decisions do not bear him out in this conclusion, but on the other hand the fiction of corporate entity is only disregarded in the plainest cases, and then only when it appears that one corporation is using the other for fraudulent purposes, or as a mere agent or instrumentality for averting responsibility. Appellant has cited no decisions, and there are none, which hold one corporation responsible for the obligations of another, when it appears that both are dealing with the public at arm's length, as the bill of complaint herein discloses. All of the decisions cited by appellant in support of his contention that the Development Company is responsible for the debts of the Copper Company involve facts very dissimilar to those presented by complainant's bill of complaint. Most of them we have heretofore distinguished.

The case of *Central Trust Company v. Nealand, 138 U. S. 114,* involved the liability of a mortgagor for property acquired subsequent to the execution of the mortgage and does not treat upon the question of liability of one corporation for the obligations of another.

In the case of *McVickers v. American Opera Company, 40 Fed. 861,* the plaintiff, McVickers, instituted suit against the defendant for breach of contract for the use of his theater. Thereafter the National Opera Company was organized and the assets of the American Opera Company were transferred to it. This action, as held by the Court, had the effect to hinder and defraud McVickers in the prosecution of his suit for the collection of his debt. Instead of holding its assets in trust for the creditors, the

American Opera Company, being insolvent, endeavored to place them where the creditors could not reach them. Of course the two companies could not maintain their separate corporate existence for such a purpose.

The case of *In re Alaska, American Fish Company, et al., 162 Fed. 498,* does not bear upon the question here involved at all, but, on the other hand, treats upon the question whether the business of catching and preserving fish is "principally engaged in manufacturing" within the meaning of the Bankruptcy Act of 1898; and whether the District Court of Washington would have jurisdiction in bankruptcy over both a California and Washington corporation, it having first acquired jurisdiction.

The case of *In re Southwestern Bridge & Iron Company, 133 Fed. 568,* discloses that a petition in bankruptcy was filed in Kansas against a Kansas and an Oklahoma corporation. Thereupon a petition was filed against the Oklahoma corporation, in Oklahoma, where a receiver was appointed. A plea was made to the jurisdiction of the District Court of Kansas over the Oklahoma corporation, and that court held that it, having first acquired jurisdiction, would retain it, and proceeded to a final adjudication and determination of the rights of the creditors to the property which was common both to the Kansas and Oklahoma corporation. No question of separate corporate entity was involved.

The case of *In re Horgan, et al., 97 Fed. 319,* held that where a corporation was organized as a mere fiction, and the assets of a partnership were transferred to it, that the corporation should deliver to the referee its books for examination. The question of liability of the corporation for the partnership debts was not involved, but merely whether the referee in the bankruptcy proceedings of the partnership could inspect the books of the corporation.

In the case of *Colonial Trust Company v. Monticello Brick*

Works, 172 Fed 310, the question was involved whether a corporation organized in Delaware by residents of Pennsylvania, for the purpose of owning stock and financing certain Pennsylvania corporations was transacting business within the State of Pennsylvania contrary to the requirements of law of that State, so that its contracts made therein were void and unenforceable. The District Court held that it was conducting business contrary to the laws of Pennsylvania, so that its contracts were void and unenforceable as a claim in the bankruptcy court, and this ruling was affirmed by the Circuit Court of Appeals for the Third Circuit. The facts there involved have no relation whatsoever to those under present consideration.

In the case of *Salt Lake Valley Canning Company, et al., v. Collins, 176 Fed. 91,* this court held valid an order of a referee in bankruptcy consolidating, for convenience of administration, a proceeding in bankruptcy against a partnership and its members, with a bankruptcy proceeding of a corporation, which was owned entirely by one of the partners. No question of liability of the one for the debts of the other was involved.

In the case of *Western Union Telegraph Co. v. United States & Mexican Trust Company, et al., 221 Fed. 545,* it was held that a purchase, through a foreclosure sale, or otherwise, of the property of an insolvent corporation by a new corporation, pursuant to a plan or scheme of the bondholders and stockholders of the insolvent company, whereby the stockholders thereof derived, by receipt of stocks or bonds of the new company, or otherwise, benefits equal to or greater than those received by or openly offered to and rejected by its general creditors, is fraudulent in law as to the latter, and renders the new corporation and the property purchased at such sale liable for the claim of such creditors against the old company, at least to the extent of the value of the interest secured by the stockholders of the old com-

pany in excess of the value of the interest secured by, or openly offered to and rejected by the unsecured creditors.

The Copper Company did not organize the Development Company to purchase its property at the foreclosure sale so as to constitute a fraud upon the creditors of the Copper Company, nor does it definitely appear from the bill of complaint herein that the Development Company was the purchaser at the foreclosure sale under a deed of trust of the property of the Copper Company, and even if it were the bill is insufficient of fact to disclose that such a sale and purchase constituted a fraud upon the creditors of the Copper Company.

The case of *In re McCarthy Portable Elevator Company, 196 Fed. 247,* discloses that McCarthy caused to be organized the McCarthy Portable Elevator Company to promote his patented device. Of the 1,000,000 shares of stock McCarthy owned 899,999 shares. The corporation became bankrupt and McCarthy presented his claim for $10,180.00, of which $7,600.00 was for compensation at the rate of $500.00 per month for services rendered. The referee ordered the claim allowed and petition was made to the District Court for a review of his order. The question involved was whether the corporation should be responsible for the payment of compensation to McCarthy, in view of the fact that it was organized by him merely for the purpose of promoting his patent. The Court said:

> "If McCarthy had not formed a corporation, but sought to perfect and market his patented device as an individual no compensation would have been allowed him for services rendered in case of his bankruptcy. Why should he be allowed such compensation for performing the same services for a like purpose simply because he did it as an officer of a corporation, which was his own creature and made to serve his individual interest? To do this would be to declare that the form rather than the substance, a shadow rather than the real, governs the right. The law is not so imbecile."

The situation in that case was merely tantamount to McCarthy presenting a claim against himself for services rendered, which, of course, was discountenanced.

THE FACTS OF THE BILL OF COMPLAINT ARE INSUFFICIENT TO BRING THE CASE WITHIN THE EXCEPTIONS TO THE GENERAL RULE OF SEPARATE CORPORATE EXISTENCE, AS DISCLOSED BY THE DECISIONS.

Our reading of the cases impress us with the fact that *fraud* controlled the decision of most of them. How different is the situation here! The trustee of the bankrupt Copper Company asks this court to appropriate, toward the payment of its debts, property of the Copper Company, which has been judicially sold to satisfyy its pre-existing debts, and this, in spite of the fact that the highest court of the State of Arizona has declared that sale regular and valid in all respects. See *Martin v. Bankers' Trust Company, supra.*

The bulk of the indebtedness, which appellant seeks to collect from the Development Company, consists of the bankrupt's notes made to the Development Company. He asserts the validity of these claims, thereby recognizing the separate corporate entities of the two companies. The bankruptcy court, according to appellant's allegations, has already allowed those claims, including a claim by the Development Company in the sum of thirty-nine thousand four hundred and twenty-three and 2/100 ($39,423.02) dollars. (Tr. of Rec., p. 14-16.) It does not appear that appellant objected in the bankruptcy court to the allowance of these Development Company's notes as claims against the bankrupt Copper Company. Such a procedure was followed *In re McCarthy Portable Elevator Co., 196 Fed. 247,* last cited. Appellant might well have opposed the allowance of these

claims against the bankrupt upon the ground which he now urges, and at that time contested the validity of his present contention that the Copper Company could not be indebted to the Development Company. But now, after the bankruptcy court has allowed those claims, has listed the Development Company as one of the creditors of the Copper Company, and has proved the validity of more than one million dollars of promissory notes, made by the Copper Company to the Development Company, and negotiated by the latter company to the Empire Trust Company, National Park Bank, Thomas W. Joyce, and Philbin, Beekman, Menken & Griscom, thereby necessarily negativing appellant's present contentions, he seeks to force the Development Company to pay these very notes. He does this upon the theory that all of those debts were debts of the Development Company.

Appellant does not claim that the Development Company was a mere agent or instrumentality of the bankrupt, but that the bankrupt, on the other hand, into whose shoes he has stepped, was a mere agent and instrumentality of the Development Company. If he is right there should be no bankruptcy proceedings against the Copper Company, because its assets all belong to the Development Company. By his own allegations he seeks to nullify the separate corporate entity of his own bankrupt for the purpose of rendering the Development Company responsible for the debts of the Copper Company. In supporting this theory he puts forward authorities holding that, upon a proper showing, the corporate entity of a subsidiary corporation may be ignored and all of its assets drawn into the bankruptcy estate of the parent company. But he cites no authority which lends any support, whatever, to his contention that, as trustee of the Copper Company, the alleged agent and instrumentality of the Development Company, he has a right to resort to the parent company to satisfy the proved and

allowed claims against the Copper Company, whose trustee he is.

Manifestly, when the Copper Company, upon petition of certain of its creditors (Tr. of Rec. p. 13) was adjudged bankrupt, its corporate character was affirmed, and its separate corporate entity conceded. Each and every creditor whose claim was proved and allowed against the Copper Company made oath that it, not the Development Company, owed the debt. They thereby affirmed and recognized its separate corporate entity. How then may appellant, as representing these creditors be permitted to assert rights against the Development Company that neither the creditors nor the bankrupt would be heard to assert?

While asserting that the Copper Company was a mere agent and instrumentality of the Development Company, thereby rendering the latter liable to the creditors of the former, appellant, in the next breath, alleges that the Smelting Company and the Railroad Company were dummy corporations organized, controlled and managed by the Development Company, which caused the capital stock of those companies to be held by another dummy of the Development Company, namely, the Copper Company, of which appellant is trustee in bankruptcy. (Tr. of Rec. p. 6.) But, as to these two dummies, appellant concluded, and so alleges, that the shares of their capital stocks constituted assets of the Copper Company, diverted from its creditors by the foreclosure proceedings. That is to say, under appellant's theory, the dummy Copper Company drew to itself all of the assets of the dummy Smelting Company and Railroad Company, its fellow offsprings of the Development Company, and thereupon turns about and annexes all of the assets of the parent of all of them, and all of this upon the flexible theory that this court should ignore all corporate entities except that of his bankrupt, the Copper Company.

When we turn to appellant's theory that he should have a lien upon all of the mining properties sold upon foreclosure, and should be declared the owner of the shares of stock of the Railroad and Smelting Companies, sold upon the same foreclosure, we find it more curious, if possible, than his theory of personal liability of the Development Company. The mortgage from the Copper Company is not claimed to have been fraudulent or invalid in any particular. It was given to secure payment of two million dollars of bonds of the Copper Company. It covered and included the mining properties and shares of stock now sought to be claimed through the benevolent interposition of a court of equity. Appellant does not question the validity of the mortgage debt. He shows that foreclosure proceedings were begun in the State Court on July 3, 1911 (Tr. of Rec. p. 11), before the bankruptcy proceedings were instituted (Tr. of Rec. p. 13); and that a decree of foreclosure was entered under which these properties were sold for one hundred and two thousand ($102,000.00) dollars (Tr. of Rec. p. 12) to Leo Goldschmidt of Tucson, Arizona. In such a manner these properties of the Copper Company were applied to a satisfaction of a mortgage debt, the validity of which is not questioned. But it is claimed, without bringing Leo Goldschmidt before the Court, that he was a mere agent of the Development Company and that therefore, although the mortgage debt was valid, and even if it were the judgment creditor and had a perfect right to become the purchaser at the foreclosure sale, nevertheless, because it did so, it must now give up the property and lose its debt as well, in order that the property may be devoted to the payment of unsecured creditors of the Copper Company. It is marvelous, indeed, that such ingenuity should be displayed in a court of equity, or that a trustee in bankruptcy should hope to clothe himself in sought-for equities to which the bankrupt and the bankrupt's creditors could hardly raise

their eyes. It will at once be apparent that appellant should have contested the mortgage foreclosure, if he thought the mortgage invalid, or if any defense existed. The decree was entered December 28, 1914 (Tr. of Rec. p. 12). Appellant became trustee July 2, 1914 (Tr. of Rec. p. 17). Upon the record the mortgage must be taken as valid, the foreclosure sale as regular, and the entire proceedings proof against collateral attack, placing the mines and shares of stock beyond the reach of the trustee of the Copper Company, in payment of whose valid debts they have already been applied, and whose equity and title therein have been foreclosed by a decree of another court of competent jurisdiction.

Again, this property is sought to be appropriated towards a payment of the debts of the Copper Company, because complainant is *informed* and *believes* (Tr. of Rec. p. 11, paragraph XII, Bill of Complaint) that Leo Goldschmidt, who is not joined as a party to this action, bought it in at the foreclosure sale for the use and benefit of the Development Company. What a superficial allegation to destroy that peculiar attribute of a corporation, namely, the separateness between it and the stockholders who compose it! The complainant is not satisfied because the property of the Copper Company has been sold to satisfy the conditions of the trust deed executed by the Copper Company, but he now wants a court of equity to assist him to the extent that the same property may again be used by the Copper Company for the payment of its bankruptcy claims. What use he will then want to make of the property is not yet disclosed.

For aught that appears from the bill of complaint, the Development Company never contracted a debt. There is no allegation that a single creditor of the Copper Company dealt with it upon the representation that the Development Company would stand responsible for its debts. The creditors of the Copper Company, whom complainant repre-

sents, made their obligations with it, and not with the Development Company. All the property now sought to be appropriated towards the payment of the Copper Company's debt, was primarily in the possession of that company, and was sold to pay the secured creditors of that company.

Every fact of the bill of complaint seems to negative complainant's contention that the Copper Company was the instrumentality, adjunct, etc., of the Development Company. The assets of the Copper Company (and it does not appear that the Development Company had any assets) were judicially sold to pay its obligation. The Development Company is not asking any court to do one thing, which would deprive the creditors of the Copper Company of one penny. The bill of complaint does not disclose that anything fraudulently was done which inured to the advantage of the Development Company, its creditors and stockholders, or to the disadvantage of the Copper Company, its creditors and stockholders. The deed of trust, which was secured by the property of the Copper Company was recorded in Pima County, Arizona, where it operated, so that the most uncautious creditor was given notice that the pecuniary responsibilities of the Copper Company were thus burdened. Do these facts warrant a court of equity foisting upon the Development Company the debts of the Copper Company? We submit that the legal fiction of separate corporate entity is too essential for the development and maintenance of legitimate business for a court of equity to destroy that legal fiction upon such superficial and indefinite allegations as complainant has presented here.

We confidently submit that none of the cases involving the question now engaging the court's attention are authority for holding the Development Company liable for the Copper Company's debts, under the allegations of complainant's bill of complaint.

For all of which reasons the order of the lower court, dismissing complainant's bill for insufficiency of fact to constitute a valid cause of action in equity against defendant, should be affirmed.

All of which is respectfully submitted.

EVERETT E. ELLINWOOD,
JOHN M. ROSS,
LESLIE C. HARDY,
Solicitors for Appellee,
Bisbee, Arizona.

No. 2822

In the
United States Circuit Court of Appeals
for the Ninth Circuit

JOHN H. MARTIN, Trustee of the Imperial Copper Company, a Corporation, Bankrupt,

Appellant,

—vs.—

THE DEVELOPMENT COMPANY OF AMERICA, a Corporation,

Appellee.

ADDITIONAL BRIEF FOR APPELLEE

SELIM M. FRANKLIN,
Solicitor for Appellee, Tucson, Arizona.

Filed
OCT 9 - 1916
F. D. Monckton,
Clerk.

In the
United States Circuit Court of Appeals
for the Ninth Circuit

JOHN H. MARTIN, Trustee of the Imperial Copper Company, a Corporation, Bankrupt,

Appellant,

—vs.—

THE DEVELOPMENT COMPANY OF AMERICA, a Corporation,

Appellee.

No. 2822

ADDITIONAL BRIEF FOR APPELLEE

SELIM M. FRANKLIN,
Solicitor for Appellee, Tucson, Arizona.

STATEMENT OF THE CASE.

John H. Martin, as Trustee in Bankruptcy of the Imperial Copper Company, a corporation, bankrupt, brought suit before the United States District Court for the District of Arizona, against The Development Company of America, a corporation, wherein, as such trustee in bankruptcy, he seeks to obtain a judgment against The Development of America, for $1,280,-686.22, with interest, and further seeks to have this judgment declared a lien upon certain property which had been mortgaged by the Imperial Copper Company to secure an issue of $2,000,000 of bonds, and which

mortgage had been foreclosed in the State Court, and which mortgaged property had been sold under said decree of foreclosure.

The lower court sustained defendant's motion to dismiss, on the ground that the complaint stated no cause of action against the defendant, The Development of America. From this judgment John H. Martin, as Trustee in Bankruptcy, has appealed to this court.

The question, therefore, presented on this appeal, is whether or not the complaint states a cause of action against the Development Company.

FACTS ALLEGED IN THE COMPLAINT

The facts alleged in the complaint are briefly as follows:

That in the year 1903 the Development Company held a contract for the purchase of certain mining properties situated at Silverbell, Pima County, Arizona, at a price of $515,000; that thereafter, and on May 2, 1903, the Development Company caused the Imperial Copper Company to be organized as a corporation under the laws of Arizona, for the purpose of having it acquire and operate the properties mentioned in the contract. (Rec. p. 2-3).

That the Development Company caused the title to all of said mining properties to be vested in the Copper

Company, and the same were operated by the Copper Company for the use and benefit and convenience of the Development Company. (Rec. p. 4). That the Development Company at all times owned and controlled "practically all of the shares of the capital stock of said Copper Company; elected its directors, officers and managers, and controlled its business. (Rec. p. 3-4).

That the Development Company, in 1903, caused the Copper Company to execute a first mortgage or deed or trust on all the mining properties so standing in the name of the Copper Company, to secure $2,000,000 of bonds issued by the Copper Company; that these bonds were issued and delivered by the Copper Company to the Development, and the Development Company "used all of said bonds and the proceeds of the sale thereof in its business of purchasing, developing and operating mines and smelting properties; and the Development Company also used all the capital stock of said Copper Company of the par value of $5,000,000, and the proceeds of the sale thereof, in the said business of purchasing, developing and operating mines and smelting properties in Arizona." (Rec. p. 5-6).

That thereafter, and some time in 1903 and 1904, the Development Company caused to be created two other corporations, to-wit: The Arizona Southern Railroad Company and the Southern Arizona Smelting Company, and caused all the shares of the capital stock of said two corporations to be issued to the Copper Com-

pany; and thereafter caused the Copper Company to pledge all of said shares as additional security for the said issue of $2,000,000 of bonds. (Rec. p. 6-7).

That some seven years thereafter, to-wit, on July 3, 1911, said Development Company "being then and there the owner and holder of and controlling a majority of said bonds, and the said shares of stock of the said Copper Company, caused a suit to be instituted in the then District Court of the First Judicial District of the Territory of Arizona, in and for Pima County, to foreclose said mortgage or deed of trust, on all of said mining properties and on said shares of stock of said Rialroad Company and Smelting Company (Rec. p. 11-12). That two days after the institution of this foreclosure suit, to-wit, on July 5, 1911, a petition in bankruptcy was filed against the Copper Company in the Territorial District Court, by certain of its creditors, and thereafter, and on July 25, 1911, the Copper Company was adjudged a bankrupt; that claims aggregating $1,-280,686.22 were filed against said Copper Company,, Bankrupt, and have been allowed. (Rec. p. 13-16). The names of the creditors and the amount of their respective claims are set forth in the complaint, from which it appears that the $2,000,000 of bonded indebtedness secured by the mortgage on the property of the Copper Company was not filed in the bankruptcy court as a claim by the respective owners of the bonds; that on August 12, 1911, M. P. Freeman was elected trustee in bankruptcy of said Copper Company and acted as such until July 2, 1914, when he resigned, and John

H. Martin, the plaintiff in the present action, was elected and qualified as such trustee. (Rec. p. 16-17).

That plaintiff is informed and believes that some agreement was entered into between the Development Company and F. M. Murphy, its President, on the one hand, and the creditors of the Copper Company, Bankrupt, on the other hand, whereby the bankruptcy proceedings should lie dormant, so as to enable the Development Company and Murphy, its President, to raise sufficient money to pay off all debts, and that in pursuance of this agreement the creditors of the Copper Company, Bankrupt, did allow the bankruptcy proceedings to lie dormant until on or about July 2, 1914, when John H. Martin became the new trustee in bankruptcy. (Rec. p. 17).

That some six months after John H. Martin had been so elected and qualified as the new trustee in bankruptcy of the Copper Company, to-wit, on December 28, 1914, The Development Company caused a decree of foreclosure to be obtained in the State Court of Arizona (successor of the Territorial court) in the suit against the Copper Company to foreclose the mortgage heretofore mentioned, given to secure the issue of $2,000,000 of bonds, and obtained an order of sale of all of the mortgaged property, including the mining properties and shares of stock; that all of said mortgaged property was sold under the forecloseure decree of the State Court, and one Leo Goldschmidt of Tucson, Arizona, became the purchaser thereof, at a price of $90,000,

for the mining properties, and $12,000 for the shares of the Railroad Company and Smelting Company; that he purchased the same for the use and benefit of the said F. M. Murphy, the President and chief officer of said Development Company. (Rec. p. 11-12).

That the action of the Development Company in causing the property to be sold under the foreclosure decree resulted in stripping the Copper Company, Bankrupt, of practically all of its assets, with the exception of certain personal property of the value of about $1400. (Rec. p. 18).

That there is not sufficient money or property in the estate of the Copper Company, Bankrupt, to pay dividends to creditors. (Rec. p. 18). That plaintiff is advised and informed, and therefore alleges, that by reason of the matters and things hereinbefore set forth, the Development Company of America became and is liable for all the debts of the Copper Company, filed in the bankruptcy proceedings, and amounting to $1,280,-686,26, with interest; and that all of the said mining properties, and the said shares of stock of said Railroad Company and of said Smelting Company, so purchased at said foreclosure sale by the said Development Company of America, or for its use and benefit, are liable for all of said debts. (Rec. p. 18-19).

Wherefore, the plaintiff prays judgment:

1. That he recover judgment against the Development Company for $1,280,886.22, being the total

amount of debts filed and allowed against the Copper Company in the bankruptcy proceedings.

2. That all of the property mortgaged to secure the $2,000,000 of bonds and sold under the decree of foreclosure be declared to be liable for the claims of the unsecured creditors of the Copper Company, Bankrupt, as filed and allowed in the bankruptcy proceedings, and that said claims be declared to be a lien thereon, and that all of said property be decreed to be a part of the assets of the Imperial Copper Company, applicable to the payment of its unsecured creditors. (Rec. p. 19-20).

POINTS PRESENTED

As the trial court held that this complaint did not state a cause of action in favor of Martin, as Trustee in Bankruptcy of the Copper Company, and against the Development Company of America, the only question in the case is whether or not the complaint does state a cause of action.

ARGUMENT

THE THEORY OF THE PLAINTIFF

The theory upon which Martin, Trustee, asks for judgment against the Development Company, is that the Copper Company was a subsidiary corporation of the Development Company, and for that reason, the Development is liable for its debts.

That the Copper Company is a corporation; that it has a corporate existence; and that as such an existing entity it could and did have property, and could and did create debts, and could and did do those acts which warranted it in being adjudged a bankrupt under the Act of Congress, are conclusively determined by the fact that it has been adjudicated a bankrupt. And that the claims filed and allowed against this bankrupt company, enumerated in the complaint, are just and valid debts against it, that it owes those debts, and that its assets subject only to prior liens, must be applied to the payment thereof, has also been adjudicated by the bankruptcy court, by the allowance of the claims, and is **res adjudicata;** this is all alleged in the complaint.

Here then arise two questions: First, is the Development Company liable for the debts of the Copper Company? Second, if it is liable, to whom is it liable; to the creditors themselves, or to the trustee in bankruptcy of the Copper Company?

We maintain that the Development Company, under the facts alleged in the complaint, is not liable for the

debts of the Copper Company. And that if it is liable, that liability is directly to **each creditor** respectively, and is not a liability to the Copper Company, for which its trustee in bankruptcy has a right of action.

We will consider the second proposition first; for if Martin, as trustee, has no right of action to enforce the liability of the Development Company, even if that Company be also liable for the debts of the Copper Company, then the question of the liability of the Development Company to the creditors of the Copper Company becomes immaterial in this case.

Martin, as Trustee, has no right of action against the Development Company.

Even if the Development Company is liable for any or all the debts of the Copper Company, on the theory that the Copper Company was only its subsidiary or agent, that liability is to the creditors themselves. It is not a debt for which the Copper Company could bring suit and recover judgment. It is not an asset of the bankrupt estate. It is simply a joint liability or debt to each creditor which each creditor has the right to enforce, if he so desires.

The Copper Company has not paid one dollar of these liabilities or debts. In the complaint it is alleged that Martin as trustee of the Copper Company, bankrupt, has not sufficient money or assets to pay any dividend whatsoever upon any of the claims filed and allowed. (Rec. p. 18).

The claims have been adjudged to be valid against the Copper Company; but the estate of that Company has not been diminished one dollar by virtue thereof, for it has no estate out of which to pay the same, and it never has or can pay them, or any part thereof.

The estate of the Copper Company, bankrupt, has no right to be reimbursed for moneys it has not and never will pay. Its trustee in bankruptcy has no right of action to recover upon a debt due directly from the Development Company to each creditor, when no part of that debt has been or will be paid by the bankrupt, or out of its estate.

The most that can be said is, that if the Development Company is liable for the debts of the Copper Company, then both companies are liable; a joint liability; a liability similar to the liability of the Development Company as joint maker or endorser of the notes, executed by the Copper Company; a liability, so far as the Development Company is concerned, which can only be enforced against it by the creditor to whom it is liable.

If, for example, any creditor mentioned in the complaint, whose claim against the Copper Company, bankrupt, has been duly filed and allowed, should bring suit to recover the same debt from the Development Company, on the theory that the Development Company was the parent corporation, and if the liability of the Development Company upon that ground was beyond question, nevertheless the Development Company

could plead as a set-off or counter claim in that suit, any debt which the suing creditor owed to it. It could make defense that the creditor, on some other account or transaction, was indebted in a larger sum to it; and by proof thereof defeat a judgment.

But if the subsidiary company, or its trustee in bankruptcy, has right of action to enforce the liability of the parent company to the creditor, on the theory that the parent company is directly liable to the subsidiary company for all debts incurred by the subsidiary company, then the parent company could **not** plead such set-off or counterclaim; for the setoff of counterclaim is against a creditor who is no party to the suit.

Counsel for appellant assert that Martin, as trustee of the bankrupt, has the right to sue the other joint debtor, who is not insolvent, and make that solvent joint debtor pay the debt **to him,** the trustee; they assert that the right of action which the creditor has against the solvent joint debtor, passes to the trustee in bankruptcy of the insolvent joint debtor, as part of tha insolvent's estate, to be realized on, converted into money, as a debt due to the bankrupt, to be administered upon as other assets of the bankrupt.

The trial court held that the right of the creditor to enforce his debt against the solvent joint debtor—the Developmen Company in the present case—was a right and property of the creditor, and was no right or asset of the bankrupt joint debtor—the Copper Company in the present case—which passed to its trustee in bank-

ruptcy as an asset of the bankrupt estate. And the court, holding that the creditors themselves, respectively, had a right of action to enforce any alleged liability or debt claimed by them against the Development Company, and that this right of action did not pass to the trustee of the Copper Company bankrupt, sustained the motion to dismiss the complaint herein. Which ruling, we submit, is correct.

Therefore, even if the allegation of the complaint, to the effect that the Imperial Copper Company was only a subsidiary corporation of the Development Company, be considered as true, nevertheless, that fact does not give a cause of action to the trustee in bankruptcy of the Imperial Copper Company to recover from the Development Company of America any of the debts which have, according to the allegations of the complaint, been adjudicated to be good and valid debts against the Imperial Copper Company itself.

Counsel for appellant have cited no cases, and we assert that no case can be found, where a trustee in bankruptcy of a subsidiary corporation has been held to be entitled to a money judgment against the parent corporation for the amount of the debts due by the subsidiary corporation.

The cases cited by counsel, which are pertinent to this point at all, are cases in which **the creditor** of the subsidiary corporation himself brought suit against the parent corporation, on the theory that as principal, the parent corporation, was liable for the debt of its agent.

Thus: In the case of Interstate Tel., Co., vs. Baltimore & O. Tel. Co. 51 Fed. 49, the suit was a creditor's bill brought by a creditor to obtain payment against the parent corporation upon a judgment obtained against the subsidiary corporation. In that case the court held, we quote from the syllabus:

> **"Held,** that as the railroad company was the sole stockholder of the Telegraph Company of Baltimore County, and appointed its officers and held it out as having authority to contract with regard to the whole system owned by the railroad company, the Telegraph Company of Baltimore County was a mere agent of the railroad company, a mere name, in fact, under which the railroad company conducted its telegraph business, and that, under the circumstances of this case, a court of equity had jurisdiction to decree that the railroad company, as principal, should pay complainant's judgment against its agent, from which it had taken all the property which it had represented that its agent controlled."
>
> Interstate Tel. Co. vs. Baltimore & O. Tel. Co. of Baltimore, 51 Fed. Rep. 49.

And so in the same case, on appeal to the Circuit Court of Appeals Fourth Circuit, reported 54 Fed. 50-55, 4 C. C. A. 180, the court held, we quote from the syllabus:

> "The fact that complainant elected to sue the agent, the telegraph company, and takes judgment against it, did not preclude it from maintaining the suit against the railroad company to compel payment of such judgment."

The case of Joseph R. Foard Co., vs. State of Maryland, 219 Fed. 827-836, 135 C. C. A. 497 was a suit

by a servant, injured in the employ of one company which was organized and controlled by another company. The court said, we quote again from the syllabus:

> "Where a ship brokerage company organized and completely controlled a stevedoring company, whose officers were its own officers, furnished its office, kept its accounts, and handled all its funds, paid its losses, and kept its profits as a charge for managing its business, the two companies were identical as to third persons, and both were liable for damages caused by the negligence of an employee of the stevedoring company in conducting its business."

Joseph R. Foard Co. vs. State of Maryland, 219 Fed. 827. 135 C. C. A. 497.

Counsel for appellant, in the present case, cite these authorities, and others of like import, all of which hold that both the parent and the subsidiary company are liable to creditors and to others having claims, as authority for their assertion that the subsidiary company itself, or its trustee in bankruptcy, can sue and recover against the parent company, for the liability of the parent corporation to the third person. But none of these cases support this contention, and no case can be found which so holds.

The allegations, therefore, of the complaint in the present case, to the effect that the Development Company of America owned all the stock of the Copper Company, and controlled its affairs, and that it was liable for all of the debts of the Copper Company, does

not state any cause of action in favor of the Copper Company, or Martin, as its trustee in bankruptcy. And whether these allegation are sufficient to state a cause of action in favor of a creditor of the Copper Company as against the Development Company, is immaterial in this case, for this is not a suit brought by any creditor.

We therefore respectfully submit that the complaint in this action does not state facts sufficient to constitute any cause of action in favor of Martin, as Trustee in Bankruptcy of the Imperial Copper Company, entitling him to a money judgment against the Development Company of America.

The Copper Company, under the facts alleged in the complaint, was not a subsidiary or agent of the Development Company.

In the foregoing argument we have shown that Martin, as trustee of Copper Company, bankrupt, has no cause of action against the Development Company, even if the Copper Company were a subsidiary corporation of the Development Company.

We will now show, that under the facts alleged in the complaint, the Copper Company was not a subsidiary or auxiliary or agent of the Development Company.

The specific facts alleged are these: That the Development Company, in 1903, held a contract to purchase for the sum of $515,000, certain mines at Silver Bell, Pima County, Arizona. (Rec. p. 3).

That the Development in 1903 caused the Copper Company to be organized; that it acquired these properties the purchase of which was $515,000, and caused the title thereto to be taken in the name of and to be vested in the Copper Company. And caused these mines to be developed and operated by and in the name of the Copper Company. (Rec. p. 4).

That the Development Company also organized a railroad company, also a smelting company, and caused all the capital stock of each of those two companies to be issued to and vested in the Copper Company. (Rec. p. 6).

That the Development Company, in 1903, caused the Copper Company to issue $2,000,000 of bonds, which were secured by a deed of trust or mortgage upon all of the property of said Copper Company, including all the said mines which were owned by the Copper Company, with the plants and equipment thereon, and all the shares of the capital stock of the Smelting Company and the Railroad Company, also owned by the Copper Company. (Rec. p. 6-11). That this entire issue of $2,000,000 of bonds and $5,000,000 of the capital stock of the Copper Company, being all of its capital stock, were issued and delivered by the Copper Company to the Development Company. (Rec. p. 6). That the Development Company sold or disposed of these bonds and sold or disposed of this stock. (Rec. p. 6). We will quote from the complaint:

"and that the said Development Company used all of said bonds **and the proceeds of the sale thereof,** in its business of purchasing, developing and operating mining and smelting properties; and that the Development Company also used all the capital stock of the said Copper Company, of the par value of $5,000,000 and the proceeds of the sale thereof, in its said business of purchasing developing and operating mining and smelting properties in Arizona." Rec. p. 6.

Now, if the Development Company has disposed of all the bonds and capital stock of the Copper Company by using those bonds and shares, and the proceeds arising from the sale thereof, in conducting its mining business, all of which is alleged in the complaint to have been done by it in 1903, then it no longer owned or owns those bonds and stock; but divers and sundry persons who acquired the same from the Development Company were and are the owners thereof; and the Copper Company could not be a subsidiary or instrumentality of the Development Company.

There is no allegation that the property conveyed to the Copper Company was not adequate consideration for the purchase price so paid in stock and bonds. No allegation of any kind showing fraud, and no allegation of fraud even as a conclusion of law.

But it being alleged that the Development Company had disposed of these shares of stock, then the transferees or assignees of those shares became the stockholders; they became the real owners of the assets and

property owned by the Copper Company, subject only to the corporate debts.

The Copper Company could not be a subsidiary or auxiliary of the Development Company, for the Development Company was not the sole and only stockholder; it had sold or disposed of its stock.

It is further alleged in the complaint, that the Development Company not only caused the title of these mining properties to be vested in the Copper Company, but that it also caused these mining properties to be developed and operated in the name of the Copper Company. (Rec. p. 4).

And so, from 1903, when the Copper Company was organized, down to July, 1911, when it was adjudicated a bankrupt, the Copper Company operated these extensive mining properties in its own name. The mere allegation in the complaint, that the Development Company, by virtune of its stock ownership, controlled the election of the directors, or controlled its business, is not sufficient to support the allegation that it was a mere subsidiary or instrumentality or agent.

Therefore, under the specific allegations in the complaint, the Copper Company was no subsidiary or agent of the Development Company.

The Copper Company owned vast properties which it paid for with $2,000,000 of bonds secured by mortgage, and with $5,000,000 of its capital stock. Having this mining property, so mortgaged, it engaged in devel-

oping and operating its mines, from 1903 to 1911, a period of eight years.

During that time, the Development Company, which at first owned all that capital stock, disposed of it; and the Copper Company in conducting its mining operations, incurred a large amount of debts, which on the day it was adjudicated a bankrupt, in 1911, amounted to over a million dollars.

Under these specific allegations of fact, the Copper Company, according to the authorities, was not a subsidiary or auxiliary of the Development Company; it was a duly organized corporation, having its own property; conducting its own business; contracting its own debts for which it and it alone was liable.

The law on this subject is concisely stated in a case decided May 2, 1916, by the Circuit Court of Appeals, Sixth Circuit, to-wit: Pittsburg & Buffalo Co. vs. Duncan, 232 Fed. Rep. 584-588, wherein the court said:

> "The mere fact that the stockholders in two or more corporations are the same, or that one corporation exercises a control over the other through ownership of its stock, or through identity of its stockholders, does not make either the agent of the other, nor does it merge them into one, so as to make a contract of one corporation binding upon the other, where each corporation is separately organized under a distinct charter. Central Trust Co. vs. Bridges, (C. C. A. 6) 57 Fed. 753, 6 C. C. A. 539; Richmond & I. Constr. Co. vs. Richmond, etc. R. R. Co. (C. C. A. 6) 68 Fed. 105, 108, 15 C. C. A. 289, 34 L. R. A. 625; In re Watertown Paper Co. (C. C. A. 2) 169 Fed. 252, 255, 94 C. C. A.

528. True, the legal fiction of distinct corporate existence will be disregarded when necessary to prevent fraud, or when a corporation is so organized and controlled and its affairs so conducted 'as to make it only an adjunct or instrumentality of another corporation.' In re Watertown Paper Co., supra; Gay vs. Hudson River Elec. Power Co. (C. C. A. 2) 187 Fed 12, 14, 109 C. C. A. 66; Foard Co. vs. Maryland (C. C. A. 4) 219 Fed. 827, 829, 135 C. C. A. 497. But 'it requires a strong case to induce a court of equity to consider two corporations as one, on account of one owing all the capital stock of the other.' 1 Cook on Corporations (7th Ed.) sec. 317; and see Peterson vs. C., R. I. & P. R. R. Co., 205 U. S. at page 393, 27 Sup. Ct. 513, 51 L. Ed. 841."

Pittsburgh & Buffalo Co. vs. Duncan, 232 Fed. Rep. 584-588.

We therefore submit, that under the facts alleged in the complaint, the Copper Company was not a subsidiary or instrumentality or agent of the Development Company; and the Development Company is not liable even to the creditors of the Copper Company, for the debts of the Copper Company. And for this reason also the complaint states no cause of action against the Development Company, and was properly dismissed.

The mortgaged property of the Copper Company, sold under foreclosure decree, is no longer an asset of its estate, and its general creditors have no lien thereon.

It is alleged in the complaint that in 1903 the Copper Company executed a mortgage or deed of trust upon all its property to secure issue of $2,000,000 of bonds; that

this mortgage has been foreclosed by decree of the State Court, and the property has been sold under that decree.

Martin, as Trustee, ignoring this mortgage, decree and sale thereunder, seeks also in this suit to recover that property as assets of the bankrupt estate, to be used in the payment of the unsecured creditors.

On July 5, 1911, when the Copper Company was adjudged a bankrupt, all this mortgaged property **was** an asset of the Copper Company, and by the Bankruptcy Act the title thereto did pass to its trustee in bankruptcy, subject, however, to this mortgage lien.

If the trustee, or any of the general creditors, claimed that this mortgage was **not** a valid lien on the property, they should have asserted that claim either before the bankruptcy court, or before the court where the foreclosure suit was pending.

In the complaint it is alleged that a suit was pending against the Copper Company to foreclose this mortgage, when the bankruptcy petition was filed. The foreclosure suit was brought July 3, 1911, (Rec. p. 11); the petition in bankruptcy was filed two days thereafter, to-wit, on July 5, 1911. (Rec. p. 13).

M. P. Freeman was elected and qualified as the trustee in bankruptcy of the Copper Company August 12, 1911. (Rec. p. 16). He resigned as such on July 2, 1914, on which day Martin, plaintiff herein, was elected and qualified. (Rec. p. 16).

Five months after Martin so became the trustee in bankruptcy, to-wit, on December 28, 1914, the state court in which the foreclosure suit was pending, did render its decree foreclosing the mortgage, and directed the sale of the property to pay the mortgage debt, the $2,000,000 of bonds; and the property was duly sold under this decree for $102,000. (Rec. p. 12).

The Copper Company, being a party defendant to that suit, is forever foreclosed by that decree. The validity of the mortgage; that the property therein described was liable for the mortgage debt; that the Copper Company only had an equity of redemption, which equity was foreclosed; is forever settled by the decree of the state court, if the state court had jurisdiction.

That the state court did have jurisdiction, the foreclosure suit having been brought before bankruptcy proceedings were instituted, is decided by the Supreme Court of Arizona, in the case of Martin, trustee of Imperial Copper Company vs. Bankers Trust Company, trustee for the bondholders, 156 Pac. Rep. 87-94.

In that case the court said:

> "Objection is made to the jurisdiction of the "court on account of bankruptcy proceedings. "There is no suggestion in the record that the bank- "ruptcy court thought there was any equity in the "property for the benefit of the general creditors. "The bankruptcy court is not seeking to enforce its "power and authority, whatever it may be. The "state court has never been asked to surrender the

"property, nor has the bankruptcy court indicated "that it would be willing to take possession thereof. "It is the appellant who is seeking to enforce an al- "leged jurisdiction of a court which that court has "abstained from seeking to enforce. The court in "bankruptcy did, however, recognize the jurisdic- "tion of the superior court by making an order "directing its trustee to make an application to "intervene in the foreclosure proceeding, "which the trustee did and was allowed "to become a party in intervention by the "superior court. The liens in suit were acquired "many years before the proceedings in bankruptcy, "and the foreclosure suit was pending when such "proceedings were commenced. The liens sought "to be foreclosed are nowhere in the acts of Con- "gress relating to bankruptcy denounced, but, on "the other hand, preserved and protected. In other "words, they do not belong to those classes of liens "expressly declared by the Bankruptcy Act to be "dissolved by an adjudication within four months "after they attached, nor to cases of fraud, or at- "tempted preference; but come within the rule that "the trustee in bankruptcy takes the property of "the bankrupt, subject to all such valid and exist- "ing liens as would be enforceable against it in the "hands of the bankrupt itself. The jurisdiction of "the state court to enforce the lien was not divested "by the subsequent proceedings in bankruptcy:

* * * * * * * *

"It is clear the superior court had jurisdiction."

Martin vs. Bankers' Trust Co., 156 Pac. Rep. 88-89.

Therefore, the foreclosure suit, having been brought before the bankruptcy petition was filed, the state court had jurisdiction to foreclose the mortgage, and its de-

cree therein is binding on the Copper Company, and on Martin, as its trustee in bankruptcy.

It is true that Martin, trustee, does not directly attack this decree in his complaint; but he does allege that one Leo Goldschmidt, who purchased the property at the foreclosure sale for $102,000, was the mere agent of the Development Company or of F. M. Murphy representing the stockholders and bondholders of that Company (Rec. p. 12), and he asks that the sale be ignored; that the fact that Goldschmidt, either for himself or as agent for the Development Company, or agent for Murphy, paid the purchase price $102,000 be also ignored; and that all this property be decreed to be an asset of the Copper Company, free of any lien, and be turned over to him, to be applied to the payment of the debts of the unsecured creditors of the Copper Company.

The theory upon which this startling demand is made is this: That the Development Company is liable for the debts of the Copper Company; that the purchase by Goldschmidt was in fact for the Development Company, or its stockholders and bondholders; and therefore, that the title acquired by Goldschmidt is for the benefit of the unsecured creditors of the Copper Company, because the Development Company is also liable to those creditors.

And Martin, as trustee, prays in his complaint "that "all of the said mining properties be decreed to be a part "of the assets of the said Imperial Copper Company, "bankrupt; that the jurisdiction of plaintiff, as trustee

"of said Imperial Copper Company, bankrupt, be ex-"tended to the same and that the properties be ad-"ministered upon by plaintiff as such trustee." (Rec. p. 20).

Under the laws of Arizona, the Copper Company, as mortgagee, had the right any time within six months after the foreclosure sale, to redeem the property, by repaying the $102,000 paid by the purchaser at the foreclosure sale, plus interest thereon. The statute of Arizona on this subject is as follows:

> "When a mortgage or deed of trust is foreclosed, the court shall render judgment for the entire amount found to be due, and must direct the mortgaged property, or so much thereof as is necessary, to be sold to satisfy the same, with interest and costs. An execution shall issue accordingly, and the sale thereunder shall be subject to redemption as in cases of sale under execution."
>
> Sec. 4116, R. S. A. of 1913.
>
> "Property sold subject to redemption, as provided in the last section, or any part sold separately, may be redeemed in the manner hereinafter provided by the following persons or their successors in interest.
>
> (1) The judgment debtor or his successor in interest in the whole or any part of the property."
>
> Sec. 1374, R. S. A. of 1913.
>
> Redemption shall be made only by the following persons and within the following times, namely:
>
> "The judgment debtor or his heirs, executors, administrators, or grantees may redeem at any time within six months after the date of the sale."

Sec. 1375, R. S. A. of 1913.

The right of redemption, the mortgagee being a bankrupt, became vested in Martin as its trustee in bankruptcy and he had the right to redeem, under the statute, by paying the amount for which the property was sold, with interest.

However, he did not redeem. He has not repaid this purchase price. On the contrary, he comes into a court of equity and asks that court to decree that he shall be vested with all the property so sold, his time for redemption having expired, and he never having redeemed and never having paid, or offered to pay, one dollar of the money which the statute of Arizona required him to pay, if he desires to redeem. Clearly, Martin a trustee, having the right to redeem, and having failed to exercise that right, has now no further right of any kind in or to the property.

Again, and irrespective of the right of redemption given by the statute of Arizona, he who seeks equity must do equity.

Martin alleges in his complaint that the property in question was sold under decree of court to Leo Goldschmidt, and that Goldschmidt paid $102,000 to the court therefor. Whether Goldschmidt acted for himself, or as agent for the Development Company, or for Murphy, or for the stockholders and bondholders of the Development Company, as alleged in the complaint, and no matter for whom he acted, he or his principals paid $102,000 to the state court as the purchase price

of the property sold to him at the foreclosure sale; and he or they are entitled to be reimbursed this sum, before being devested of the title or property so purchased.

Before a court of equity will permit Martin, as trustee or otherwise, even to enter the threshold of justice, to assert that the title to the property so sold and paid for should be vested in him, it will require him to do equity by at least offereing to repay to the purchaser this sum of $102,000, which the purchaser so paid.

But Martin makes no such offer. He does not allege in his complaint that he ever tendered this sum, or any sum, to Goldschmidt, or to the Development Company, or to Murphy, or to anyone; nor does he allege any offer or willingness to pay this sum, or any sum, to anyone.

He boldly prays in his complaint that this property be decreed to his, as trustee of the bankrupt, to be delivered to him and administered upon by him as assets and property of the Copper Company, without himself even offereing to repay the money which the purchaser at the foreclosure sale paid therefor. Such a complaint is manifestly so void of equity that the court must dismiss it, and for that reason also the lower court was right in dismissing the bill.

The point raised by appellant, that the defendant waived its motion to dismiss for insufficient allegations of fact to constitute a cause of action, by filing its answer to the merits, has no merit for two reasons.

First, because the judgment of the lower court shows that the motion was argued and submitted to the lower

court by counsel for both the parties, on the theory that it was not waived, (Rec. p. 38-39); and this submission of the motion by both parties precludes either from now claiming that it was waived.

Second, as the complaint states no cause of action whatsoever, it could not support a judgment, and it was the duty of the court to dismiss it of its own motion.

CONCLUSION.

We therefore respectfully submit:

1. That under the allegations of the complaint, the Copper Company was not a subsidiary or agent of the Development Company, and the Development Company is not liable for its debts.

2. That even if the Development Company is liable for the debts of the Copper Company, that liability is that of a joint maker, and can only be enforced by the respective creditors to whom the liability is due, and is not a liability to the Copper Company, or its estate, which can be enforced by its trustee in bankruptcy.

3. That Martin, as Trustee of the Copper Company, Bankrupt, has no right, title or interest in the property covered by the mortgage executed by the Copper Company, for the reason that the mortgage has been foreclosed by the decree of a court having jurisdiction, and

no redemption has been made from that sale by Martin, as trustee, or otherwise.

For these reasons the complaint does not state facts sufficient to constitute any cause of action against the Development Company, and the judgment of the lower court dismissing the same upon that ground, should be affirmed.

Respectfully submitted,

SELIM M. FRANKLIN,
Solicitor for Appellee.

No. 2824

United States

Circuit Court of Appeals

For the Ninth Circuit.

In the Matter of SOUTHERN ARIZONA SMELTING COMPANY, a Corporation, Bankrupt.

M. P. FREEMAN, as Trustee in Bankruptcy of SOUTHERN ARIZONA SMELTING COMPANY, a Corporation, Bankrupt,

Appellant,

vs.

JOHN H. MARTIN, as Trustee in Bankruptcy of IMPERIAL COPPER COMPANY, a Corporation, Bankrupt,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the District of Arizona.

Filed
JUL 15 1916
F. D. Monckton,
Clerk.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

No. 2824

United States

Circuit Court of Appeals

For the Ninth Circuit.

In the Matter of SOUTHERN ARIZONA SMELTING COMPANY, a Corporation, Bankrupt.

M. P. FREEMAN, as Trustee in Bankruptcy of SOUTHERN ARIZONA SMELTING COMPANY, a Corporation, Bankrupt,

Appellant,

vs.

JOHN H. MARTIN, as Trustee in Bankruptcy of IMPERIAL COPPER COMPANY, a Corporation, Bankrupt,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the District of Arizona.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

Index.

Page

Findings of Fact..... 42
Names and Addresses of Counsel of Record.... 1
Notice of Appeal..... 102
Order Allowing Appeal..... 96
Order Extending Time to File Record and Docket Cause to August 14, 1916..... 104
Order Nunc Pro Tunc Re Suit in Equity, etc... 39
Petition of John H. Martin, Trustee of the Imperial Copper Company, a Corporation, Bankrupt, Claiming Certain Property Scheduled in the Above-entitled Matter as Property of the Southern Arizona Smelting Company, Bankrupt..... 1
Praecipe for Transcript of Record..... 105
Stipulation Re Institution of Cause of Action, etc..... 37

Names and Addresses of Counsel of Record.

ELLINWOOD & ROSS, Bisbee, Arizona,

SELIM M. FRANKLIN, Tucson, Arizona,

Counsel for Appellant.

FRANCIS M. HARTMAN, EDWIN F. JONES, Tucson, Arizona,

Counsel for Appellees. [1*]

In the United States District Court for the District of Arizona.

In the Matter of the SOUTHERN ARIZONA SMELTING COMPANY, a Corporation, Bankrupt.

Petition of John H. Martin, Trustee of the Imperial Copper Company, a Corporation, Bankrupt, Claiming Certain Property Scheduled in the Above-entitled Matter as Property of the Southern Arizona Smelting Company, Bankrupt.

Now comes John H. Martin, Trustee in Bankruptcy of the Imperial Copper Company, a Corporation, bankrupt, and respectfully represents to your Honorable Court:

That the estate of the Imperial Copper Company, Bankrupt, is the owner of and entitled to the possession of certain property listed and scheduled herein by the said Southern Arizona Smelting Company, the said bankrupt, situate at Sasco, Pinal County, Arizona, and described as follows, to wit:

*Page-number appearing at foot of page of original certified Record.

A certain flue dust dump, containing many thousand tons of flue dust, the value of which, your petitioner is informed and believes and upon such information and belief alleges, is approximately the sum of fifty thousand dollars.

A certain slag dump, consisting of many thousand tons of slag, the value of which, your petitioner is informed and believes and therefore alleges, is approximately the sum of fifteen thousand dollars.

That the facts upon which your petitioner bases this claim of ownership and right of possession of said property for the estate of said Imperial Copper Company, a corporation, [2] bankrupt, are as follows:

1. That said Imperial Copper Company was organized in May, 1903, by Messrs. F. M. Murphy, B. P. Cheney and associates, for the purpose of acquiring, owning and operating mines, mining properties, smelting plants, and for other purposes in connection therewith.

2. That some time in the year 1906, the said Imperial Copper Company caused to be organized the said Southern Arizona Smelting Company, and from the time of said organization and up to the present time, the officers and directors of said Smelting Company and said Copper Company have been and now are, practically the same persons; and from the time of the organization of said company and during all the times mentioned herein the said Copper Company owned and controlled all of the issued and outstanding shares of stock of said Smelting Company; and during all the times mentioned

herein absolutely directed and controlled the affairs of said Smelting Company.

3. That shortly after the organization of said Smelting Company, the said Copper Company, being then and there the owner of a large tract of land situate at said town of Sasco, Pinal County, Arizona, conveyed said land to said Smelting Company, and upon which said tract of land the said Copper Company thereafter caused to be erected a large smelting plant at a cost of approximately six hundred thousand dollars, all of which said money was furnished by the said Imperial Copper Company out of its own funds.

4. That the said Smelting Company was so organized by the said Imperial Copper Company as an auxiliary and subsidiary corporation, for the convenience of said Copper Company in transacting its said business of mining and [3] smelting, and for the purpose of smelting ores from the mines belonging to said Copper Company and other ores purchased by the said Imperial Copper Company, and the said Smelting Company was not an independent corporation or entity in the transaction of said business, but that during all of the times mentioned herein it was simply an adjunct, agent and instrumentality of the said Copper Company.

5. That the said Copper Company, during all of the times mentioned herein, and during all the times the said Smelting Company was so in operation, paid out of its own funds all of the salaries and wages of the employees of said Smelting Company and all of the accounts, bills and indebtedness for

materials and supplies used by said Smelting Company in the smelting of the ores from the mines belonging to said Copper Company and the ores so purchased by the said Copper Company.

6. That the said Smelting Company, during all of the times mentioned herein kept no bank account and had no funds of its own, and the business of said Copper Company and said Smelting Company was so interwoven and intermingled as to be inseparable.

7. That subsequent to the erection of said smelting plant the said Copper Company produced and mined from its said mine a large amount of ore, and caused the same to be smelted and treated at said smelting plant, and that said Copper Company also purchased certain small quantities of ore from other concerns and caused the same to be smelted and treated at said smelting plant, and that the said slag and the said flue dust above mentioned and described are and were the products of the ores so mined from the said Copper Company's mines and so purchased by the said Copper **[4]** Company, and that the said slag and the mineral contents and values of the said flue dust came out of the ores mined by the Copper Company from its said mines and from ores purchased by the said Copper Company and so smelted at said smelting plant.

8. That the said Copper Company did not sell its said ores so smelted by the said Smelting Company to the said Smelting Company, and the said Smelting Company did not purchase from the said Copper Company the said ores so smelted at said plant, and your petitioner is informed and believes and

therefore alleges that there existed between said Copper Company and said Smelting Company some manner or form of agreement by which the said Smelting Company was to be allowed a credit with the said Copper Company for the cost per ton of smelting said ore, but that said agreement did not provide that said slag and said flue dust should belong to or be the property of said Smelting Company.

9. That the said Smelting Company did not receive any of the proceeds of the bullion or products of any ores so smelted from the mines of said Copper Company or from the ores so purchased by said Copper Company, but that said Copper Company received all such proceeds and handled and disposed of the same.

10. That heretofore, on July 5th, 1911, a petition in bankruptcy was filed against said Imperial Copper Company, a corporation, and on July 25th, 1911, the said corporation was duly adjudicated a bankrupt. That thereafter, on August 12th, 1911, M. P. Freeman was elected trustee of said estate and duly qualified as such and acted as such trustee until July 2, 1914, at which time your petitioner was duly elected and qualified as such trustee, and is now and ever since has **[5]** been such trustee.

11. That claims have been filed against the said Imperial Copper Company, bankrupt, in excess of one million dollars, and your petitioner is informed and believes and upon such information and belief alleges that a large portion of the indebtedness represented by said claims was incurred by the said

Imperial Copper Company to obtain money with which to erect, equip and operate and maintain the said smelting plant, and also that a large portion of the claims filed in the matter of said Imperial Copper Company, bankrupt, by the creditors thereof represent indebtedness incurred by the said Imperial Copper Company for goods, wares and merchandise, supplies and materials used at the said smelting plant in the operation thereof.

12. That all of the assets of the said Smelting Company, including the said slag and the said flue dust were duly appraised as a part of the assets of the said Imperial Copper Company, Bankrupt, on the 20th day of September, 1911, by the appraisers duly appointed by the Court in said bankruptcy proceedings, and taken into account as a part of the assets of said Imperial Copper Company, bankrupt.

13. That on or about the 5th day of July, 1914, your petitioner, as Trustee of said Imperial Copper Company, bankrupt, took actual possession of said slag dump and flue dust, as part of the assets of said Imperial Copper Company, bankrupt, and was in the actual possession of the same at the time of the adjudication in bankruptcy of the said Southern Arizona Smelting Company, and of the appointment of Mr. M. P. Freeman, as trustee therein.

14. Your petitioner is informed and believes and upon such information and belief alleges that the estate of the **[6]** said Southern Arizona Smelting Company, bankrupt, has no right, title or interest in or to any of the said slag or said flue dust, and that the trustee in bankruptcy of the said Southern

Arizona Smelting Company has no right to the possession and control thereof, or any part thereof.

WHEREFORE, your petitioner prays as follows:

1. That the said property, to wit, the said slag and the said flue dust be stricken from the schedules filed herein by the Southern Arizona Smelting Company, bankrupt.

2. That the estate of the said Imperial Copper Company, bankrupt, be adjudged to be the owner and entitled to the possession of said slag and said flue dust and that your petitioner, as Trustee in Bankruptcy of said Imperial Copper Company, bankrupt, be adjudged to be entitled to the possession of said property.

3 That the Trustee in Bankruptcy of said Southern Arizona Smelting Company, to wit, Hon. M. P. Freeman, be directed to turn over said property, to wit, said slag and said flue dust, to your petitioner as Trustee in Bankruptcy of said Imperial Copper Company.

4. That the estate of said Southern Arizona Smelting Company, and the said M. P. Freeman, Trustee in Bankruptcy of said Southern Arizona Smelting Company, and each of them be adjudged to have no right, title or interest in or to any of said property or entitled to the possession thereof.

5. For other further and general relief as to the Court may seem meet and proper and for costs.

Answer under oath waived.

FRANCIS M. HARTMAN,
E. F. JONES,
Attorneys for Petitioner. [7]

State of Arizona,
County of Pima,—ss.

John H. Martin, being first duly sworn, deposes and says: That he is the Trustee in Bankruptcy of the Imperial Copper Company, a corporation, bankrupt, and the petitioner named in the foregoing petition. That he has read the foregoing petition and knows the contents thereof, and that the same is true in substance and in fact, of his own knowledge, except as to matters and things therein stated on information and belief, and as to such matters and things he believes it to be true.

JOHN H. MARTIN.

Subscribed and sworn to before me this 12th day of February, 1915.

My commission expires Feb. 19, 1916.

[Notary Seal] R. W. LANGWORTHY,
Notary Public, Pima County, Arizona.

[Endorsements]: B–9 (Tucson). E.–47 (Tucson). In the United States District Court for the District of Arizona. In the Matter of the Southern Arizona Smelting Co., Bankrupt. Petition of John H. Martin, Trustee in Bankruptcy of the Imperial Copper Co., Bankrupt, Claiming Flue Dust and Slag Dump. Service of within accepted this 12th day of February, 1915. Selim M. Franklin, Attorney for M. P. Freeman, Trustee of Southern Arizona Smelting Co. Filed Feb. 12, 1915, 3 P. M. F. H. Bernard, Referee. [8]

In the United States District Court for the District of Arizona.

In the Matter of SOUTHERN ARIZONA SMELTING COMPANY, a Corporation,

Bankrupt.

Answer of M. P. Freeman, Trustee of the Southern Arizona Smelting Company, a Corporation, Bankrupt, to the Petition of John H. Martin, Trustee of the Imperial Copper Company, Claiming Certain Property.

Now comes M. P. Freeman, Trustee in Bankruptcy of the Southern Arizona Smelting Company, a corporation, bankrupt, and without waiving his objections to the jurisdiction of the referee, heretofore filed herein, does make this answer and reply to the petition of John H. Martin, Trustee of the Imperial Copper Company, a corporation, bankrupt, filed herein;

1. He denies that the estate of the Imperial Copper Company is the owner or entitled to the possession of the property mentioned and described in said petition, and described as follows, to wit: A certain flue dust dump, containing many thousand tons of flue dust and a certain slag dump, consisting of many thousand tons of slag; and he denies that the said flue dust dump is of the value of $50,000, but avers that he is informed and believes it has but little value at the present time. And he further avers he does not know the value of the said slag dump.

2. In answer to the paragraph or section marked "1" of said petition, this respondent admits that the Imperial Copper Company was organized in

May, 1903, but is without [9] knowledge as to whether the same was organized by Messrs. F. M. Murphy, B. P. Cheney and associates, and avers that the purpose of the organization is set forth in the articles of incorporation of said company, and will show the purposes for which said corporation was organized.

3. In answer to the paragraph or section marked "2" of said petition, this respondent admits that the Southern Arizona Smelting Company was organized as a corporation in the year 1906; but this respondent is without knowledge as to whether or not the said Imperial Copper Company caused the said Southern Arizona Smelting Company to be organized and this respondent is without knowledge as to whether or not, from the time of said organization of said Copper Company and up to the present time, the officers or directors of said Smelting Company and said Copper Company have been, or now are, practically the same persons; respondent denies that from the time of the organization of said Smelting Company, or during all or any of the times mentioned in said petition, the said Copper Company owned or controlled all of the issued and outstanding shares of said Smelting Company; and denies that during all the times mentioned in said petition said Copper Company absolutely directed or controlled the affairs of said Smelting Company; but in this behalf, respondent alleges that all of the said shares of stock except a few issued to qualify directors were pledged with the Bankers Trust Company,

a corporation, as security for certain bonded indebtedness.

4. In answer to the paragraph or section marked "3" of said petition, this respondent says that he is informed and believes that some time shortly after the organization of said Smelting Company, the said Imperial Copper Company did convey to said Smelting Company, a certain tract of land at the town of Sasco, Pinal County, Arizona, and that said Imperial [10] Copper Company caused to be erected a large smelting plant thereon, but this respondent is without knowledge as to the approximate cost thereof and he alleges that the said land was so conveyed and the said smelter was so erected under an agreement between the Copper Company and the Smelting Company, said agreement being reduced to writing and being dated on or about the 14th day of August, 1906, wherein and whereby the Copper Company agreed to make such conveyance and to erect such smelting plant in consideration of the issuance to it of 7,995 shares of the full paid-up stock of said Smelting Company as fully appears from the said agreement, aforesaid, a copy of which said agreement is hereto annexed and marked exhibit "A" and is made a part of this reply.

5. In answer to the paragraph or section marked "4" of said petition this respondent says that he is without knowledge as to whether said Smelting Company was so organized by the said Imperial Copper Company as an auxiliary and subsidiary corporation for the convenience of said Copper Company, as alleged in said paragraph; that he is in-

formed and believes that one of the purposes of the organization of said Smelting Company was to smelt the ores from the mines belonging to said Copper Company; but he is further informed and believes and upon such information he denies that the said Smelting Company was not an independent corporation or entity and denies that during all or any of the times mentioned in said petition it was simply an adjunct or agent or instrumentality of said Copper Company; but he alleges that it was an independent corporation, and as more fully hereinafter set forth.

6. In answer to the paragraph or section marked "5" of said petition, this respondent alleges that he is informed and believes and upon such information and belief denies that the said Copper Company, during all of the times mentioned in [11] said petition, or during all of the times the said Smelting Company was so in operation, paid out of its own funds, all or any of the salaries or wages of the employees of said Smelting Company, or all or any of the accounts, bills or indebtedness for material or supplies used by said Smelting Company in the smelting of the ores from the mines belonging to said Copper Company, or the ores so purchased by the said Copper Company.

7. In answer to the paragraph or section marked "6" of said petition, this respondent denies that during all of the times mentioned in said petition said Smelting Company kept no bank account or had no funds of its own; and denies that the business of said Copper Company and said Smelting

Company was so interwoven or intermingled as to be inseparable; but this respondent is informed and believes and upon such information and belief alleges that the said Smelting Company did keep a bank account with the said Copper Company who acted as its banker in this regard, and that the business of said Smelting Company and its books and accounts were kept entirely separate and distinct from the business, books and accounts of said Copper Company, and that said Smelting Company kept separate books of account and that in no way was its affairs or its business interwoven with those of said Copper Company, so as to be inseparable, or at all.

8. In answer to the paragraph or section marked "7" respondent admits that subsequent to the erection of said smelting plant, there were smelted at the smelting plant of said Smelting Company, large quantities of ore which were produced from the mines of said Copper Company, but denies that said Copper Company purchased certain small quantities or any quantities of ore from other concerns and caused the same to be smelted or treated at said smelting plant; but in [12] this behalf, respondent avers that he is informed and believes, and upon such information and belief alleges that the said Smelting Company itself did smelt and treat for persons and corporations other than said Copper Company, quantities of ore at its said plant, aforesaid, during the time the said plant was in operation; and respondent denies that the slag and flue dust mentioned in said petition were the

products of the ores mined from the Copper Company's mines and ores purchased by said Copper Company and so smelted at said smelting plant; and in this behalf, respondent alleges that he is informed and believes and upon such information and belief avers that the said slag dump and the said flue dust are the results or residue from the smelting of all the ores which were smelted by said Smelting Company at its said smelting plant, being the residue or result from ores which were smelted by the said Copper Company, as well as from ores of other persons and companies.

9. In answer to the paragraph or section marked "8" of said petition, this respondent avers that he is without knowledge as to whether the said Copper Company did or did not sell its said ores so smelted by the Smelting Company to the said Smelting Company, or as to whether or not the said Smelting Company did or did not purchase from the said Copper Company the said ores so smelted at said plant; but he alleges that he is informed and believes that the contract, a copy of which is hereto annexed and marked Exhibit "A," fully sets forth the terms and conditions upon which the said Smelting Company did smelt the ores for the said Copper Company; and upon such information and belief, this respondent further denies that there was any manner or form of agreement, as alleged in said paragraph 8 of said petition, other than the said agreement marked Exhibit "A," and annexed hereto, and he further avers that he is informed and believes that under and

by virtue of said agreement, the said [13] slag dump and flue dust did belong to and was the property of the said Smelting Company.

10. In answer to the paragraph or section marked "9" respondent alleges that he is informed and believes and upon such information and belief denies that the said Smelting Company did not receive any of the proceeds of the bullion or products of any ores so smelted from the mines of said Copper Company, or from the ores alleged to have been purchased by said Copper Company, and denies that said Copper Company received all or any of such proceeds or handled or disposed of the the same; and this respondent further alleges that he is informed and believes that on or about the 16th day of December, 1907, a certain contract in writing was entered into between said Smelting Company and the American Metal Company, Limited, and the said Copper Company, which fully shows and sets forth the way and manner in which all the proceeds of the bullion or products of the ores smelted by the said Smelting Company, were received and handled and disposed of, a copy of which said agreement is hereto annexed marked Exhibit "B" and is made a part hereof.

11. In answer to the paragraph or section marked "11" of said petition, this respondent admits that claims have been filed against the Imperial Copper Company, bankrupt, in excess of $1,000,000, but he is without knowledge as to whether or not any of said claims, or indebtedness represented by said claims, was incurred by the said Imperial Copper

Company to obtain money with which to erect, equip, operate and maintain said smelting plant, or for what purpose a large or any part of said indebtedness was incurred by the said Imperial Copper Company; but he further alleges that he is informed and believes and upon such information and belief alleges that all, or nearly all, or the greatest part of the moneys expended [14] by said Imperial Copper Company in erecting and equipping said smelting plant was raised by the sale of its bonds, which bonds were secured, amongst other things, by the pledge of the said shares of stock of the Smelting Company, issued by the Smelting Company to the Copper Company, as a consideration for the said land conveyed, and the said plant so erected, and as hereinafter more fully set forth.

And in further answer to said paragraph or section marked "11," this respondent is informed and believes, and upon such information and belief he denies that a large portion of the claims, or any of the claims, filed in the matter of said Imperial Copper Company by the creditors thereof, represent indebtedness incurred by the said Imperial Copper Company for goods, wares and merchandise, supplies and materials used by the said smelting plant in the operation thereof; on the contrary, upon such information and belief, this respondent alleges that all of the goods, wares and merchandise, supplies and materials for which said claims were filed in the matter of said Imperial Copper Company, were for goods, wares and merchandise, sup-

plies and material which were not used at said smelting plant at all, or in the operation thereof, but were supplied by the said Imperial Copper Company for the use of its mines and mining operations only, and its boarding-house and merchandise store.

12. In answer to the paragraph or section marked "12" of said petition, this respondent denies that all of the assets of said Smelting Company, including the said slag and flue dust, were duly appraised as a part of the assets of the said Imperial Copper Company, bankrupt, as alleged in said petition, and denies that the same were taken into account as a part of the assets of the said Imperial Copper Company, bankrupt, and this respondent further avers that the said Smelting Company, as he is informed and [15] believes was never advised of the said alleged appraisement and never consented thereto, and is in no ways bound thereby, and further avers that the said Smelting Company has been in the peaceable and adverse possession of the said flue dust and slag dump, claiming the same to be its own property, for a period of more than four years continuously, immediately prior to its adjudication as a bankrupt, and the appointment of this respondent as its trustee in bankruptcy, and that any claim or cause of action of the said Imperial Copper Company, or of the said John H. Martin, Trustee in Bankruptcy of said Imperial Copper Company, is barred by the provisions of the statutes of limitations of the States of Arizona, and particularly by the provisions of sections 710, 711, 713 and 716 of the Re-

vised Statutes of the State of Arizona of the year 1913.

13. In answer to the paragraph or section marked "13" of said petition, respondent denies that on or about the 5th day of July, 1914, or ever or at all, the said petitioner, as trustee, or otherwise, took actual possession of said slag dump or flue dust, as part of the assets of said Imperial Copper Company, bankrupt, or at all; and denies that he was in the actual possession of the same at the time of the adjudication in bankruptcy of said Southern Arizona Smelting Company, or at the time of the appointment of this respondent as trustee herein; and this respondent further avers that he is informed and believes, and upon such information and belief alleges, that the said Southern Arizona Smelting Company had been in the adverse and peaceable possession of the said slag dump and the said flue dust, claiming to be the owner thereof, and exercising publicly dominion and control thereof, for more than four years continuously, prior to the said 5th day of July, 1914, and that any claim or cause of action on the part of the said Imperial Copper Company, or on the part of the said John H. Martin, as Trustee [16] of said Imperial Copper Company, bankrupt, is barred by the statute of limitations of the State of Arizona, and particularly by the provision of the statues of limitations of the said State of Arizona hereinbefore specifically enumerated.

14. In answer to the paragraph or section marked "14" of said petition, this respondent de-

nies that the said Southern Arizona Smelting Company, bankrupt, has no right or title or interest in or to the said slag or said flue dust and denies that the said trustee in bankruptcy of the said Southern Arizona Smelting Company has no right to the possession or control thereof, or any part thereof; on the contrary, this respondent avers that the said Southern Arizona Smelting Company, and this respondent, as its Trustee in Bankruptcy, are the owners and entitled to the possession and control of the slag and said flue dust.

WHEREFORE, your respondent prays that the said petitioner have and take nothing herein, and be allowed no relief; that the estate of the Southern Arizona Smelting Company, bankrupt, be adjudged to be the owner and entitled to the possession of said slag and flue dust and that this respondent, as Trustee in Bankruptcy of said Southern Arizona Smelting Company, be adjudged to be entitled to the possession thereof, as part of the assets of the said Southern Arizona Smelting Company, bankrupt, and that the said Imperial Copper Company and the said John H. Martin, as Trustee for the said Imperial Copper Company, be adjudged to have no right, title or interest in or to any of said property, or to be entitled to the possession thereof; and for such other and further relief as to the Court may seem meet and proper and for costs.

ELLINWOOD & ROSS, and
SELIM M. FRANKLIN,
Attorneys for M. P. Freeman, Trustee, Respondent. [17]

State of Arizona,
County of Pima,—ss.

M. P. Freeman, being first duly sworn, deposes and says: That he is the Trustee in Bankruptcy of the Southern Arizona Smelting Company, a corporation, bankrupt, and the respondent named in the foregoing answer; that he has read the foregoing answer and knows the contents thereof, and that the same is true in substance and in fact of his own knowledge, except as to matters and things therein stated on information and belief and as to such matters and things he believes it to be true. And that the facts denied therein are not true to the best of his knowledge and belief.

M. P. FREEMAN.

Subscribed and sworn to before me this 5th day of April, 1915.

[Notary Seal] W. FRED KAIN,
Notary Public. [18]

My commission expires Nov. 20, 1916.

Exhibit "A"—Agreement, August 14, 1906, Between Imperial Copper Co. and Southern Arizona Smelting Co.

THIS AGREEMENT, made this 14th day of August, 1906, by THE IMPERIAL COPPER COMPANY, a corporation, of Arizona, hereinafter called "Copper Company," party of the first part, and SOUTHERN ARIZONA SMELTING COMPANY, a corporation of Arizona, hereinafter called "Smelting Company," party of the second part, WITNESSETH, that

WHEREAS, said "Smelting Company" is a cor-

poration organized under the laws of the Territory of Arizona, for the purpose of carrying on a general Smelting and reducting business and purposes incidental thereto and has an authorized capital stock of $1,500,000 divided into shares of $100 each; and

WHEREAS, the Imperial "Copper Company" is a producer of ores carrying copper and other valuable metals, and has acquired a valuable smelter site and townsite in Pinal County, Arizona; and

WHEREAS, the Smelting Company desires to acquire said smelter site and have erected thereon a smelter plant of a capacity of approximately 30 tons, and especially desires to obtain a contract for the ores of the "Copper Company," in order to have a basis on which to operate the smelter for outside customers' ores;

NOW, THEREFORE, in consideration of the premises and in consideration of One Dollar in hand paid by each of the parties hereto to the other, and in consideration of the covenants and agreements hereinafter made to be kept and performed by the parties hereto respectively, it is agreed by the parties hereto as follows, to wit:

The "Copper Company" having acquired six hundred and forty acres of land for a smelter site and town site, situated in Santa Cruz Valley at a point on the line of the Arizona Southern Railroad Company suitable for the erection of the smelter plant hereinafter described, agrees to erect thereon a smelter plant, together with all machinery and appliances necessary and convenient for the smelting and reduction of ores carrying values in copper and other metals, such plant, when completed, to have a

capacity of approximately 300 tons daily, and to be complete in all particulars, and erection and construction of such plant and all appurtenances and appliances thereto to be carried on under the supervision of the "Smelting Company's" General Manager or Engineer, or both, and the work to be conducted in a manner satisfactory to "Smelting Company's" Engineer or Manager; and upon completion of such plant, "Copper Company" agrees to sell, convey and transfer by deeds, bills of sale and other instruments of conveyances and transfer, all of said tract of six hundred and forty acres, constituting the smelter site and town site together with all buildings, plant and machinery upon said land and constituting said smelter plant; and agrees to furnish the "Smelting Company" with all ores of every kind produced from the Mines of the "Copper Company" (whether such mines are now owned or hereafter acquired by the "Copper Company") that may be desired by the "Smelting Company" to be smelted and reduced by the "Smelting Company." The term of such contract to be a period of six months from and after the date of the beginning of operations of said smelter.

The smelting, reduction and marketing of such ores so delivered [19] by the "Copper Company" to be done by the "Smelting Company" at the actual cost thereof plus five per cent interest on the cost of the property and plant to the "Smelting Company" to wit, $800,000.00.

IN CONSIDERATION of which the "Smelting Company" agrees to issue to the "Copper Company" or as it may direct, Seven Thousand Nine

hundred ninety-five (7,995) shares of the stock of the "Smelting Company," par value $100 each, same to be fully paid, in payment for the real estate and plant so to be conveyed and transferred, and the contract for the furnishing of the ore by the "Copper Company" to form the basis for the "Smelting Company's" operations in custom ores.

And the "Smelting Company" further agrees to take and reduce the ores so to be furnished by the "Copper Company" upon the terms and at the prices for smelting hereinbefore set forth.

IT IS FURTHER AGREED by the parties that from time to time, as work on the plant and property progress, the "Smelting Company" will issue to the "Copper Company" at the option of the "Copper Company," shares of the capital stock, full paid and non-assessible, in payment for the property, plant and contract, as follows:

> When work of construction one quarter completed, three thousand five hundred (3,500) shares.
>
> When work of construction one half completed, one thousand five hundred (1,500) shares, additional.
>
> When work of construction three quarters completed, one thousand five hundred (1,500) shares additional.
>
> When work of construction completed, one thousand four hundred ninety five (1,495) shares additional.

and the certificate of the Engineer of the "Copper Company" that the work has arrived at any of the above stages shall be sufficient to entitle the "Copper

Company" to receive certificates for the shares of stock, as above set forth.

IN WITNESS WHEREOF, the Party of the First Part has caused its corporate name to be hereunto affixed by its President, duly attested by its Secretary, and its corporate seal to be hereto attached, the day and year above written, all by authority of a resolution passed by its Board of Directors the 14th day of August, 1906.

And Party of the Second Part has caused its corporate name to be hereto affixed by its President, duly attested by its Secretary, and its corporate seal to be hereto attached the day and year above written, all by authority of a resolution passed by its Board of Directors the 14th day of August, 1906.

THE IMPERIAL COPPER COMPANY.

By E. B. GAGE,
President.

Attest: A. N. GAGE,
Secretary.

SOUTHERN ARIZONA SMELTING COMPANY.

By BENN GOODRICH,
President.

Attest: A. N. GAGE,
Secretary.

Executed in presence of:

.....

.....

As to Imperial Copper Company.

.....

.....

As to Southern Arizona Smelting Company. [20]

Exhibit "B"—Agreement, December 16, 1907, Between Southern Arizona Smelting Co. and American Metal Co., Ltd., and Imperial Copper Co.

AGREEMENT made this sixteenth day of December, 1907, by and between the SOUTHERN ARIZONA SMELTING COMPANY, a corporation organized and existing under the laws of the Territory of Arizona, party of the first part; THE AMERICAN METAL COMPANY, LIMITED, a corporation organized and existing under the laws of the State of New York, party of the second part, and THE IMPERIAL COPPER COMPANY, a corporation, organized and existing under the laws of the Territory of Arizona, party of the third part.

WITNESSETH:

That for and in consideration of the sum of One Dollar by each of the parties hereto to the other in hand paid, the receipt whereof is hereby respectively acknowledged, and in consideration of the covenants and agreements hereinafter contained, it is agreed by and between the parties to these presents as follows:

I. The party of the first part agrees to sell and hereby does sell at the price and upon the terms hereinafter set forth to the party of the second part, the entire output of copper now or at any time during the existence of this agreement smelted, owned or controlled by it, which it guarantees shall not be less than One Million two hundred and fifty (1,250,000) thousand pounds to One Million five

hundred thousand (1,500,000) pounds monthly, subject to conditions hereinafter set forth, for a period of three (3) years, beginning with the first shipment expected to be made in January, 1908, and terminating three (3) years thereafter.

While it is agreed that this contract shall cover the entire output of the party of the first part, it is understood that whenever such output shall exceed One Million five hundred thousand (1,500,000) pounds monthly, two (2) months written notice of such increase, specifying approximately the amount thereof, shall be given, and the party of the second part shall have ten (10) days from the receipt of such notice in which to decide whether or not it shall accept the increase.

If at any time such entire output shall fall below One Million two hundred and fifty thousand (1,250,000) pounds of fine copper monthly for any reason whatsoever, not the fault of the party of the first part, such deficiency shall be shipped after what would otherwise be the expiration of this contract in monthly quantities approximately equal to previous monthly shipments; and when so shipped the terms of this contract shall be considered as having been complied with in so far as the same relate to the guarantee of the quantity of monthly shipments.

II. The copper shall be delivered by the party of the first part to the party of the second part at New York, lighterage free, or at the option of the producers at Nichols Siding, Long Island Railroad, provided no additional expense thereby be occasioned the party of the second part.

Said deliveries to be made in the form of blister copper in plates, measuring about seventeen (17) inches by about twenty-four (24) inches and not more than two and one-half (2½) inches thick, and assaying about Ninety Eight and one-half (98½) [21] per cent, or more in copper; up to two hundred (200) ounces in silver and up to five (5) ounces in gold per ton of two thousand (2000) pounds; and to be free from impurities that interfere with the making of prime electrolytic copper.

III. The party of the second part agrees, at the request of the party of the first part, to advance and pay the freight charges upon the said deliveries of copper when the same shall become due in New York, and upon receipt of consignments to use due diligence in causing the same to be weighed, sampled and assayed as hereinafter provided; and to account to the party of the first part at its office in New York on the due dates as hereinafter defined for the copper, gold and silver contents of said consignments, less all advances, if any, with interest thereon; also less refining charges as hereinafter specified; it being mutually agreed that in no case shall the weighing and sampling be finished later than ten (10) days after arrival of consignments at Nichols Siding, or New York, lighterage free. The party of the first part shall give the party of the second part prompt written notice of each shipment.

The party of the first part shall have the privilege of drawing at sight upon the party of the second part for ninety (90) per cent of the approximate value of such blister copper, less freight and interest

and refining charges as above set forth, as shown by bill-of-lading, satisfactory assay certificates (the assay certificates will be satisfactory if approved by the General Manager or Local Superintendent of the party of the first part), smelter and railroad scale weights attached to the draft, in which event the party of the first part shall allow the party of the second part interest at the rate of six (6) per cent, per annum on such advances from the day the drafts are paid until dates when payments would otherwise be due.

It is understood that in case of a decline in the price of copper during the time the blister copper is in transit and until such time as payment for the copper contained therein becomes due, the party of the first part is to make good to the party of the second part any difference thus arising, so that a margin of ten (10) per cent of the value of the consignment is at all times maintained between the value of such consignment and the amount of the draft drawn by the party of the first part.

Whenever an advance has been made by the party of the second part upon any shipment of copper by means of a draft drawn by the party of the first part, as above provided, and any of such copper be lost or for any cause whatever not delivered to the party of the second part within a reasonable time, in no event to exceed sixty days after such advance, the party of the first part shall promptly repay the party of the second part the amount of such draft with interest.

IV. It is mutually agreed that each delivery of

blister copper shall be weighed and sampled upon arrival at the refining works by the parties of the first and second parts hereto jointly, and by methods mutually agreed upon by them, each such party paying its own representative.

Three (3) pulp samples shall be taken of the samples secured and one assayed by each of the parties of the first and second part, and the average of the two shall be final. Provided, however, that if the discrepancies between the two shall be [22] greater than two tenths (.2) per cent, as to copper or one (1) ounce as to silver, or three hundredths (.03) ounce as to gold per ton of two thousand (2000) pounds then in each such case the third sample shall be delivered to Lucius Pitkin as referee for assay, or to such other referee as may be equally satisfactory to both parties, and the average between his assay and that of the two which is nearest to his shall be accepted by both parties as the correct assay; and all expenses of such reference shall be borne by the party whose assay proves farthest from that of the referee's.

The methods to be pursued in determining the copper, silver and gold contents of such deliveries of blister copper shall be those which, after investigation by the chemists of each of the parties of the first and second part shall prove to the satisfaction of all such chemists to give results nearest to the actual amounts of copper, gold and silver contained in the material received.

V. The party of the second part agrees to purchase and hereby does purchase the said material

from the party of the first part upon the terms herein set forth, and agrees to pay to the party of the first part for the same in the manner following:

For all gold at the rate of twenty dollars ($20) per ounce, provided contents are five hundredths (.05) ounce per two thousand (2000) pounds, or above; if contents are below five hundredths (.05) ounce per two thousand (2000) pounds, no payment to be made therefor.

For the silver contents in said material if the same amount to one hundred (100) ounces per two thousand (2000) pounds, or less, for all such silver; if said material contains above one hundred (100) ounces per two thousand (2000) pounds, then for ninety nine (99) per cent of the silver so contained in said material at the average quotation for fine silver as published by the Engineering and Mining Journal of the City of New York for the week during which the material is sampled at the refiners.

For the copper contained in said material on the basis of electrolytic assay, at the average price of electrolytic copper in cakes, wire bars or ingots, as quoted daily in the Engineering and Mining Journal of New York for the week during which the material is sampled at the refiners; If two quotations are given by said Engineering and Mining Journal, the mean of the two to be taken as a basis for payment.

The term "week" to be understood as the six days quoted in the Engineering and Mining Journal and running from Thursday to Wednesday.

The party of the second part shall deduct and be

entitled to retain from the moneys that may be payable to the party of the first part pursuant to the terms of this contract for the cost of refining such material Fifteen Dollars ($15.) per two thousand (2000) pounds of copper find.

The due dates upon which the party of the second part agrees to account and pay for the material to be as follows: [23]

a. For the gold and silver ninety (90) days from date of arrival of the consignment at Nichols Dock or Siding, or lighterage free New York.

b. For the copper sixty (60) days from date of arrival of the consignment at Nichols Dock or Siding, or lighterage free New York.

VI. It is understood and agreed that any and all notices required or permitted to be given to either party under the terms of this contract shall be deemed sufficient if made in writing and delivered at their office in the City of New York.

VII. It is mutually understood and agreed that neither of the parties of the first and second part shall be liable for unavoidable delays in the performance thereof, or for damages as a result of such non-performance which shall be occasioned by war, labor strikes, fire or accidents arising in their respective works or mines, or on transportation lines or from other causes over which they have no control.

VIII. Whenever for a continuous period of at least thirty (30) days the price of electrolytic cop-

per in cakes, wire bars, or in ingots, as quoted in the Engineering and Mining Journal of New York, shall be below ten cents (10¢) per pound, the party of the first part shall have the option to suspend shipments under this agreement, so long as the price of such copper shall continue to remain below ten cents (10¢) per pound, provided it gives the party of the second part written notice of its intention so to do, and in that event the period of three (3) years called for by this agreement shall be extended as much longer as such shipments be so suspended.

IX. If the party of the first part shall be prevented by war, labor strike, fire, accident or other causes beyond its control from producing any copper during any month, it shall be absolved from making any shipments during such months; but in that event it shall be obligated to resume shipments as soon thereafter as such obstacles have been overcome until the entire quantity called for by this contract shall have been shipped to the party of the second part.

And whenever the party of the second part shall be prevented by war, labor strike, fire, accident or other cause beyond its control from having said copper refined, it shall be absolved from accepting any shipments during the time that such obstacle exists, provided that during such time the party of the second part shall at its own expense furnish a suitable and safe place for the storage of shipments of the party of the first part under this agreement; but in the event that any such obstacle shall continue to exist for a period longer than sixty (60) days,

the party of the first part shall have the privilege of suspending this agreement until the party of the second part shall be able to resume the refining of copper; and in that event, the party of the first part shall, at its option, have the right to make other disposition of its copper until refining can be resumed; and the party of the second part agrees to make all reasonable efforts to resume the refining of the copper under this agreement as quickly as possible, by means of [24] the refinery then used or some other refinery; and if any other refinery be used for that purpose, the copper shall be shipped to the most convenient spot for delivery at such refinery and any additional expense in the matter of freight or forwarding charges in excess of such freight and forwarding charges to the points above designated shall be borne by the party of the second part.

It is further agreed that if the party of the first part shall be prevented for any of the causes above specified in this article beyond its control from producing any copper for a continuous period of one hundred and twenty (120) days; or if the party of the second part shall be prevented for any of the causes above provided in this article beyond its control from having any shipment of copper to it refined as in this agreement provided, for a continuous period of one hundred and twenty (120) days, then in either of such events the other of said parties of the first or second part, as the case may be, shall have the privilege to terminate this agreement upon giving the party so prevented, ten (10) days' written notice of intention so to do, whereupon this

agreement shall at the end of said ten (10) days terminate and be of no further force and effect;—except that all outstanding unsettled and unadjusted matters between the parties of the first and second part under this agreement shall thereupon be promptly settled, adjusted, liquidated and paid.

X. In the event that at any time any question of difference shall arise between the parties of the first and second part hereto growing out of the interpretation of or operation under this contract, such questions shall be disposed of by arbitration.

To that end each of the parties of the first and second part shall within ten (10) days from the time either party declares its intention to arbitrate, appoint an arbitrator who shall hear the evidence and proofs submitted by each of the parties to the controversy, in the City of New York, and such arbitrators shall dispose of such questions within ten (10) days of their appointment and their decision shall be final. In case, however, that the said arbitrators shall be unable to agree, they shall within five (5) days of their inability to agree, appoint an umpire who shall consider the proofs already taken and hear such further proofs or statements as he may desire and in that event his decision as to the questions in controversy shall be final and conclusive and binding upon the parties to this agreement.

XI. And the party of the third part hereto representing that it owns practically all of the stock of the said party of the first part hereto, and owns or controls some of the mines from which the party of the first part is to acquire ore covered by this

agreement, and as a further inducement for the party of the second part to enter into this agreement, the party of the third part hereby guarantees to the said party of the second part the prompt and faithful performance by the said party of the first part hereto of all the terms and provisions of this agreement on the part of said party of the first part to be done or performed, and the party of the third part hereto waives notice of each and every default under this agreement on the part of the party of the first part. [25]

XII. It is expressly understood and agreed that the party of the second part may from time to time, as it sees fit, make any advance or loan of money to the Development Company of America or the party of the third part, upon any terms it thinks proper, and that any advance or loan already or hereafter made by the party of the second part to The Development Company of America, or to the party of the third part shall not in any way effect this agreement.

XIII. Finally it is mutually agreed that the covenants herein contained shall inure to the benefit of and bind the successors and assigns of the respective parties.

IN WITNESS WHEREOF the parties hereto have caused these presents to be signed and executed in triplicate by their respective corporate officers and their respective corporate seals to be hereunto affixed by order of their respective Boards of Direc-

tors the day and year first above written.

SOUTHERN ARIZONA SMELTING COMPANY.

By (Signed) E. B. GAGE,
President.

By (Signed) A. N. GAGE,
Secretary.

WITNESS: (Sgd)
(Seal) W. F. STAUNTON.

THE AMERICAN METAL COMPANY, "LIMITED."

By (Signed) J. LANGELOTH,
Pres.

Attest: (Seal)
(Sgd.) JULIUS GOLDMAN.

THE IMPERIAL COPPER COMPANY.

By (Signed) E. B. GAGE,
President.

By (Signed) A. N. GAGE,
Secretary.

(Sgd.)
(Seal) W. F. STAUNTON.

[Endorsements]: No. ——. In the U. S. District Court, District of Arizona. In the Matter of Southern Arizona Smelting Company, a Corporation, Bankrupt. Answer of M. P. Freeman, Trustee Southern Arizona Smelting Co., to Petition of John H. Martin, Trustee, Imperial Copper Co. Filed this 5th day of April, 1915, at 11 o'clock A. M. F. H. Bernard, Referee in Bankruptcy. Service admitted this 5th day of April, 1915. Francis M. Hartman, Attorney for John H. Martin, Trustee. Ellinwood

& Ross and Selim M. Franklin, Attorneys for M. P. Freeman. [26]

In the United States District Court for the District of Arizona.

In the Matter of the SOUTHERN ARIZONA SMELTING COMPANY, a Corporation, Bankrupt.

Stipulation Re Institution of Cause of Action, etc.

IN RE FLUE DUST AND SLAG DUMP.

IT IS HEREBY STIPULATED and agreed by and between the parties hereto, by their respective counsel, to wit, John H. Martin, Trustee in Bankruptcy of the Imperial Copper Company, a corporation, bankrupt, and M. P. Freeman, Trustee in Bankruptcy of the Southern Arizona Smelting Company, a corporation, bankrupt, that that certain proceeding heretofore instituted herein by the said John H. Martin, as Trustee of said Imperial Copper Company, a corporation, bankrupt, and now pending herein, wherein and whereby the said John H. Martin, as Trustee of said Imperial Copper Company, a corporation, is claiming the ownership, title and right of possession of a certain lot of flue dust and a certain lot of slag, situate at the smelting plant of the said Southern Arizona Smelting Company, at the town of Sasco, Pinal County, Arizona, be considered, treated and proceeded with as a plenary action in all respects, as though said action had been originally instituted by the said John H. Martin, Trustee in Bankruptcy of the said Imperial Copper Company, a

corporation, bankrupt, against said M. P. Freeman, Trustee in Bankruptcy of said Southern Arizona Smelting Company, a corporation, bankrupt, as a plenary suit in equity in the United States District Court for the District of Arizona, at Tucson:

IT IS FURTHER STIPULATED by and between the respective parties, by their respective counsel, that the said action and [27] proceeding be docketed in this court as a plenary suit in equity, entitled John H. Martin, Trustee in Bankruptcy of the Imperial Copper Company, a Corporation, Bankrupt, vs. M. P. Freeman, Trustee in Bankruptcy of Southern Arizona Smelting Company, a Corporation, Defendant; and

The foregoing stipulation having been made in open court between the parties hereto on the 21st day of February, 1916, it is further stipulated that this stipulation be entered upon the minutes of the above-entitled court, *nunc pro tunc* as of the said 21st day of February, 1916; and

Said parties, by their respective attorneys, do hereby agree and consent that the above-entitled court now make and enter an order *nunc pro tunc,* as of February 21, 1916, that the said action and proceedings so instituted by the said John H. Martin, Trustee in Bankruptcy of the Imperial Copper Company, a corporation, bankrupt, to recover the ownership, title and possession of said flue dust and slag from the estate of the Southern Arizona Smelting Company, a corporation, bankrupt, and from the said M. P. Freeman, trustee thereof, be treated, considered and proceeded with as a plenary action, as

above set forth, and that the said action be so docketed as above mentioned.

Dated this 9th day of June, A. D. 1916.

FRANCIS M. HARTMAN,
EDWIN F. JONES,

Attorneys for John H. Martin, Trustee in Bankruptcy of Imperial Copper Company, a Corporation, Bankrupt.

SELIM M. FRANKLIN,

Attorney for M. P. Freeman, Trustee in Bankrutcy of Southern Arizona Smelting Company, a Corporation, Bankrupt.

[Endorsements]: No. E–47. In the United States District Court for the District of Arizona. In the Matter of the Southern Arizona Smelting Company, a Corporation, Bankrupt. Stipulation. Filed June 14th, A. D. 1916. Mose Drachman, Clerk. [28]

In the United States District Court for the District of Arizona.

In the Matter of the SOUTHERN ARIZONA SMELTING COMPANY, a Corporation, Bankrupt.

Order Nunc Pro Tunc Re Suit in Equity, etc.

It appearing to the Court that heretofore, on February 21, 1916, a stipulation was made and entered into in open court, by and between the parties herein, to wit, John H. Martin, Trustee in Bankruptcy of the Imperial Copper Company, a corporation, bankrupt, and M. P. Freeman, Trustee in Bankruptcy of Southern Arizona Smelting Company, a corporation,

bankrupt, by their respective attorneys, that the action and proceeding instituted herein by John H. Martin, Trustee in Bankruptcy of the Imperial Copper Company, a corporation, bankrupt, to recover the ownership and possession of certain property in the possession of said M. P. Freeman, Trustee in Bankruptcy of the Southern Arizona Smelting Company, a corporation, bankrupt, to wit, a certain lot of flue dust and a certain lot of slag, situate at the smelting plant of the Southern Arizona Smelting Company, at the town of Sasco, Pinal County, Arizona, be considered, treated and proceeded with as a plenary action.

And it also appearing to the Court that an order was made by this Court on said date, to wit, February 21, 1916, in pursuance of said stipulation, that said action be treated, considered [29] and proceeded with as plenary suit in equity; and

It also further appearing that said order was not formally entered upon the minutes of the court; and

It also appearing to the Court that a written stipulation by and between the parties to said action has been filed herein stipulating and agreeing that said action and proceeding be treated, considered and proceeded with as a plenary suit, and be docketed in this court entitled John H. Martin, Trustee in Bankruptcy of The Imperial Copper Company, a Corporation, Bankrupt, Plaintiff, vs. M. P. Freeman, Trustee in Bankruptcy of the Southern Arizona Smelting Company, a Corporation, Bankrupt, Defendant:

It is therefore ordered that the action and proceeding so instituted by the said John H. Martin, Trustee

in Bankruptcy of the Imperial Copper Company, a Corporation, Bankrupt, against M. P. Freeman, Trustee in Bankruptcy of the Southern Arizona Smelting Company, a Corporation, Bankrupt, be and the same is hereby treated, considered and to be proceeded with as a plenary action and that the same be docketed in this court entitled, John H. Martin, Trustee in Bankruptcy of the Imperial Copper Company, a Corporation, Bankrupt, Plaintiff, vs. M. P. Freeman, Trustee in Bankruptcy of the Southern Arizona Smelting Company, a Corporation, Bankrupt, Defendant, in Equity.

And that this order be made and entered as of February 21, A. D. 1916.

Done in open court this 14th day of June, A. D. 1916.

WM. H. SAWTELLE,
Judge.

We hereby agree and consent to the above order.

FRANCIS M. HARTMAN,
EDWIN F. JONES,
Attorneys for John H. Martin, Trustee.

[Endorsements]: No. ——. In the United States District Court for the District of Arizona. In the Matter of the Southern Arizona Smelting Company, a Corporation, Bankrupt. Order *Nunc Pro Tunc.* Filed June 14th, 1916. Mose Drachman, Clerk. [30]

In the United States District Court for the District of Arizona.

IN EQUITY—No. E–47 (TUCSON).

In the Matter of SOUTHERN ARIZONA SMELTING COMPANY, a Corporation, Bankrupt.

JOHN H. MARTIN, Trustee in Bankruptcy of IMPERIAL COPPER COMPANY, a Corporation, Bankrupt,

Plaintiff,

vs.

M. P. FREEMAN, Trustee in Bankruptcy of SOUTHERN ARIZONA SMELTING COMPANY, a Corporation,

Defendant.

Findings of Fact.

IN RE FLUE DUST AND SLAG DUMP.

The petition of John H. Martin, Trustee of the Imperial Copper Company, a corporation, bankrupt, that he be declared the owner of certain flue dust and slag dump, which is claimed by the Trustee in Bankruptcy of the Southern Arizona Smelting Company, as part of the assets of the bankrupt estate of said Smelting Company, came on to be heard the 21st day of February, 1916, Francis M. Hartman, Esq., and E. F. Jones, Esq., appearing as attorneys for John H. Martin, Trustee, and Selim M. Franklin, Esq., appearing as attorney for M. P. Freeman, Trustee; the evidence heretofore taken before the Referee having been submitted to the Court as the evidence in the case, and the parties having agreed in open court to the following Findings of Fact therefrom, the Court

does hereby adopt the same as the Findings of Fact of the Court, as follows, to wit:

FINDINGS OF FACT.

1. That the Imperial Copper Company was organized in May, 1903, by Messrs. F. M. Murphy, B. P. Cheney, and associates, for the purpose of acquiring, owning and operating mines, mining properties and smelting plants, and for other purposes in connection therewith, and that Ben Goodrich, A. N. Gage, Henry Kinsley, E. W. Walker and John L. Miller were the incorporators, and constituted the first board of directors of said company; that Ben Goodrich was president, Henry Kinsley was vice-president and A. N. Gage was [31] secretary and treasurer, were the first officers of the corporation.

The Articles of Incorporation of the Imperial Copper Company amongst other things provide:

> "The general nature of the business proposed to be transacted by the corporation is as follows, to wit:
>
> "To locate, buy, lease, hold, sell, improve, develop and operate mines and mining properties and to pledge, mortgage or otherwise deal in the same, or any leases, options or bonds thereon.
>
> "To quarry, smelt, refine, dress, amalgamate and prepare for market and to market ores, metals and mineral substances of all kinds and to carry on any other operation which may seem conducive to any of the company's objects to buy, sell, manufacture and deal in minerals, plants, machinery, implements, conveniences, provisions and things capable of being used in connection

with mining operations or required by workmen and others employed by the corporation, to buy, construct, lease, sell, convey, maintain, improve, manage, work, control and superintend any roads, bridges, ways, reservoirs, watercourses, wharves, tramways or railroads, in so far as it may be lawful so to do, to buy, construct, lease, sell, convey, maintain, improve, manage, control and superintend furnaces, smelters, concentrators, mills, crushing works, hydraulic works, factories, warehouses and other conveniences which may seem directly or indirectly conducive to any of the objects of the corporation, and to contribute to, subsidize or otherwise aid or take part in any such operations."

2. That on or about the 11th day of May, 1904, the Imperial Copper Company duly authorized the issuance and sale of 2,000,000 of first mortgage bonds, and on said day, under proper corporate authority it did execute to the Bankers Trust Company, a corporation, doing business in the State of New York, a deed of trust, conveying to it all of the real and personal property which it then owned, or might thereafter acquire, as security for the said bonds, so authorized to be issued, which deed of trust was duly executed and recorded on June 24, 1904, in the office of the County Recorder of Pima County.

3. That on the 6th day of August, 1906, Ben Goodrich, A. N. Gage, Henry Kinsley, J. L. Miller and W. F. Walsh, duly organized under the laws of the Territory of Arizona, the "Southern Arizona Smelting Company," a corporation, bankrupt herein,

with an authorized capital stock of 1,500,000 shares. The general nature of the business proposed to be transacted by said corporation was to quarry, mine, dig, buy and otherwise acquire and deal in, sell and otherwise dispose of ores, minerals, metals and their products direct and incidental, [32] and to dress, mill, reduce, smelt, prepare, refine and otherwise treat ores, minerals, metals and their products, and to construct plants, buildings, machinery and appliances for the carrying on of any of said business; and to locate, buy or otherwise acquire farming lands, desert lands, and to locate and to acquire and develop towns, townsites, water rights, and also to construct, operate and sell works for the producing and furnishing of power, water, gas or electricity; and to operate tramways, street railroads and other methods of conveyance; to carry on merchandise business; and to hold, purchase, buy and sell, mortgage and pledge, and otherwise deal in the bonds, mortgages, notes, debentures, shares of capital stock and other securities of any private corporation, and to do other certain business, as set forth in the Articles of Incorporation.

The management and control of the business was, by its Articles of Incorporation, vested in and to be conducted by a Board of Directors of not less than five persons; the above-named incorporators being named as the persons to constitute the first Board of Directors, of whom Ben Goodrich was to be president, Henry Kinsley, vice-president, and A. N. Gage, secretary and treasurer.

That at the time of the organization of said Smelt-

ing Company in the latter part of 1906, and during all of the time of the operation of the said Smelting Company as above set forth, the following named persons were directors of the Imperial Copper Company:

E. B. Gage.
W. F. Staunton.
A. N. Gage.
H. M. Robinson.
Selwin Eddy.
F. M. Murphy.
V. L. Mason.

and that the following named persons were officers of said corporation: [33]

E. B. Gage, President.
W. F. Staunton, Vice-president and General Manager.
A. N. Gage, Secretary and Treasurer.

That during practically all of the time said smelter was in operation, to wit, during the years 1907, 1908, 1909 and 1910, the following named persons were the directors of said Smelting Company:

E. B. Gage.
W. F. Staunton.
A. N. Gage.
H. M. Robinson.
F. M. Murphy.

and that the following named persons were the officers of said Smelting Company:

E. B. Gage, President.
W. F. Staunton, Vice-president and General Manager.
A. N. Gage, Secretary and Treasurer.

4. That each of the above-named incorporators subscribed for and became the owner of one share of the capital stock of said Smelting Company, thereby qualifying themselves to act as directors.

5. That thereafter, and on the 14th day of August, 1906, the said Imperial Copper Company and the said Southern Arizona Smelting Company entered into a contract in writing, duly authorized by the respective Board of Directors of each company, in words and figures following: [34]

THIS AGREEMENT, made this 14th day of August, 1906, by THE IMPERIAL COPPER COMPANY, a corporation, of Arizona, hereinafter called "Copper Company," party of the first part, and SOUTHERN ARIZONA SMELTING COMPANY, a corporation of Arizona, hereinafter called "Smelting Company," party of the second part, WITNESSETH, that

WHEREAS, the "Smelting Company" is a corporation organized under the laws of the Territory of Arizona, for the purpose of carrying on a general smelting and reduction business and purposes incidental thereto and has an authorized capital stock of $1,500,000 divided into shares of $100 each; and

WHEREAS, the Imperial "Copper Company" is a producer of ores carrying copper and other valuable metals, and has acquired a valuable smelter site and townsite in Pinal County, Arizona; and

WHEREAS, the Smelting Company desires to acquire said smelter site and have erected thereon a smelter plant of a capacity of approximately 300 tons, and especially desires to obtain a contract for

the ores of the "Copper Company" in order to have a basis on which to operate the smelter for outside customers' ores;

NOW THEREFORE, in consideration of the premises and in consideration of One Dollar in hand paid by each of the parties hereto to the other, and in consideration of the covenants and agreements hereinafter made to be kept and performed by the parties hereto respectively, it is agreed by the parties hereto as follows, to wit:

The "Copper Company" having acquired six hundred and forty acres of land for a smelter site and townsite, situated in Santa Cruz Valley at a point on the line of the Arizona Southern Railroad Company suitable for the erection of the smelter plant hereinafter described, agrees to erect thereon a smelter plant, together with all machinery and appliances necessary and convenient for the smelting and reduction of ores carrying values in copper and other metals, such plant, when completed, to have a capacity of approximately 300 tons daily, and to be complete in all particulars, the erection and construction of such plant and all appurtenances and appliances thereto to be carried on under the supervision of the "Smelting Company's" General Manager or Engineer, or both, and the work to be conducted in a manner satisfactory to "Smelting Company's" Engineer or Manager; and upon completion of such plant, "Copper Company" agrees to sell, convey and transfer by deeds, bills of sale and other instruments of conveyances and transfer, all of said tract of six hundred and forty acres, constituting

the smelter site and townsite, together with all buildings, plant and machinery upon said land and constituting said smelter plant; and agrees to furnish the "Smelting Company" with all ores of every kind produced from the mines of the "Copper Company" (whether such mines are now owned or hereafter acquired by the "Copper Company") that may be desired by the "Smelting Company," to be smelted and reduced by the "Smelting Company." The term of such contract to be a period of six months from and after the date of the beginning of operations of said smelter.

The smelting, reduction and marketing of such ores so delivered by the "Copper Company" to be done by the "Smelting Company" at the actual cost thereof, plus five per cent interest on the cost of the property and plant to the "Smelting Company." [35]

IN CONSIDERATION of which the "Smelting Company" agrees to issue to the "Copper Company" or as it may direct, seven thousand nine hundred ninety-five (7,995) shares of the stock of the "Smelting Company," par value $100 each, same to be fully paid, in payment for the real estate and plant so to be conveyed and transferred, and the contract for the furnishing of the ore by the "Copper Company" to form the basis for the "Smelting Company's" operations in custom ores.

And the "Smelting Company" further agrees to take and reduce the ores so to be furnished by the "Copper Company" upon the terms and at the prices for smelting hereinbefore set forth.

IT IS FURTHER AGREED by the parties that from time to time, as work on the plant and property progress, the "Smelting Company" will issue to the "Copper Company," at the option of the "Copper Company," shares of the capital stock, full paid and nonassessable, in payment for the property, plant and contract, as follows:

When work of construction one-quarter completed, three thousand five hundred (3,500) shares.

When work of construction one-half completed, one thousand five hundred (1,500) shares additional.

When work of construction three-quarters completed, one thousand five hundred (1,500) shares additional.

When work of construction completed, one thousand four hundred ninety-five (1,495) shares additional.

and the certificate of the Engineer of the "Copper Company" that the work has arrived at any of the above stages shall be sufficient to entitle the "Copper Company" to receive certificates for the shares of stock, as above set forth.

IN WITNESS WHEREOF, the party of the first part has caused its corporate name to be hereunto affixed by its President duly attested by its Secretary, and its corporate seal to be hereto attached, the day and year above written, all by authority of a resolution passed by its Board of Directors the 14th day of August, 1906.

And Party of the second part has caused its corporate name to be hereto affixed by its President,

duly attested by its Secretary, and its corporate seal to be hereto attached the day and year above written, all by authority of a resolution passed by its Board of Directors the 14th day of August, 1906.

THE IMPERIAL COPPER COMPANY,
By E. B. GAGE,
President.
Attest: A. N. GAGE,
Secretary.

SOUTHERN ARIZONA SMELTING COMPANY,
By BEN GOODRICH,
President.
Attest: A. N. GAGE,
Secretary. [36]

6. In pursuance of said contract the Imperial Copper Company did erect a smelting plant on the 640-acre tract above mentioned, and did convey the same to the Smelting Company, and thereafter, and on the —— day of ————, 1907, said Smelting Company did cause 7,995 shares of its capital stock to be issued and delivered to the Imperial Copper Company in payment therefor, in accordance with said contract.

That at said time a total of 8,000 shares of stock were issued, of which 7,995 shares were issued to said Imperial Copper Company, and the remaining five shares had theretofore been issued to qualify the said directors, as heretofore stated, and no other shares of its capital stock at that time were issued or outstanding.

7. That thereafter, and about the time that the

said Smelting Company was ready to commence operations at its said smelting plant, it entered into a written contract, of date the 16th day of December, 1907, with the American Metal Company, Limited, a corporation of the State of New York, as party of the second part, and said Imperial Copper Company, as party of the third part, in words and figures following: [37]

AGREEMENT made this sixteenth day of December, 1907, by and between the SOUTHERN ARIZONA SMELTING COMPANY, a corporation organized and existing under the laws of the Territory of Arizona, party of the first part; THE AMERICAN METAL COMPANY, LIMITED, a corporation organized and existing under the laws of the State of New York, party of the second part, and THE IMPERIAL COPPER COMPANY, a corporation organized and existing under the laws of the Territory of Arizona, party of the third part,

WITNESSETH:

That for and in consideration of the sum of One Dollar by each of the parties hereto to the other in hand paid, the receipt whereof is hereby respectively acknowledged, and in consideration of the covenants and agreements hereinafter contained, it is agreed by and between the parties to these presents as follows:

I. The party of the first part agrees to sell and hereby does sell at the price and upon the terms hereinafter set forth to the party of the second part, the entire output of copper now or at any time during the existence of this agreement smelted, owned or controlled by it, which it guarantees shall not be less

than one million two hundred and fifty (1,250,000) thousand pounds to one million five hundred thousand (1,500,000) pounds monthly, subject to conditions hereinafter set forth, for a period of three (3) years beginning with the first shipment expected to be made in January, 1908, and terminating three (3) years thereafter.

While it is agreed that this contract shall cover the entire output of the party of the first part, it is understood that whenever such output shall exceed one million five hundred thousand (1,500,000) pounds monthly, two (2) months written notice of such increase, specifying approximately the amount thereof, shall be given, and the party of the second part shall have ten (10) days from the receipt of such notice in which to decide whether or not it shall accept the increase.

If at any time such entire output shall fall below one million two hundred and fifty thousand (1,250,000) pounds of fine copper monthly for any reason whatsoever, not the fault of the party of the first part, such deficiency shall be shipped after what would otherwise be the expiration of this contract in monthly quantities approximately equal to previous monthly shipments; and when so shipped the terms of this contract shall be considered as having been complied with in so far as the same relate to the guarantee of the quantity of monthly shipments.

II. The copper shall be delivered by the party of the first part to the party of the second part at New York, lighterage free, or at the option of the producers at Nichols Siding, Long Island Railroad,

provided no additional expenses thereby be occasioned the party of the second part.

Said deliveries to be made in the form of blister copper inplates, measuring about seventeen (17) inches by about twenty-four (24) inches and not more than two and one-half (2½) inches thick, and assaying about ninety-eight and one-half per cent (98½) *per cent,* or more in copper; up to two hundred (200) ounces in silver and up to five (5) ounces in gold per ton of two thousand pounds; and to be free from impurities that interfere with the making of prime electrolytic copper. [38]

III. The party of the second part agrees, at the request of the party of the first part, to advance and pay the freight charges upon the said deliveries of copper when the same shall become due in New York, and upon receipt of consignment to use due diligence in causing the same to be weighed, sampled and assayed as hereinafter provided; and to account to the party of the first part at its office in New York on the due dates as hereinafter defined for the copper, gold and silver contents of said consignments, less all advances, if any, with interest thereon; also less refining charges as hereinafter specified; it being mutually agreed that in no case shall the weighing and sampling be finished later than ten (10) days after arrival of consignments at Nichols Siding or New York, lighterage free. The party of the first part shall give the party of the second part prompt written notice of each shipment.

The party of the first part shall have the privilege of drawing at sight upon the party of the second part

for ninety (90) per cent of the approximate value of such blister copper, less freight and interest and refining charges as above set forth, as shown by bill of lading, satisfactory assay certificates (the assay certificates will be satisfactory if approved by the General Manager or Local Superintendent of the party of the first part), smelter and railroad scale weights attached to the draft, in which event the party of the first part shall allow the party of the second part interest at the rate of six (6) per cent per annum, on such advances from the day the drafts are paid until dates when payments would otherwise be due.

It is understood that in case of a decline in the price of copper during the time the blister copper is in transit and until such time as payment for the copper contained therein becomes due, the party of the first part is to make good to the party of the second part any difference thus arising, so that a margin of ten (10) per cent of the value of the consignment is at all times maintained between the value of such consignment and the amount of the draft drawn by the party of the first part.

Whenever an advance has been made by the party of the second part upon any shipment of copper by means of a draft drawn by the party of the first part, as above provided, and any of such copper be lost or for any cause whatever not delivered to the party of the second part within a reasonable time, in no event to exceed sixty days after such advance, the party of the first part shall promptly repay the

party of the second part the amonut of such draft with interest.

IV. It is mutually agreed that each delivery of blister copper shall be weighed and sampled upon arrival at the refining works by the parties of the first and second parts hereto jointly, and by methods mutually agreed upon by them, each such party paying its own representative.

Three (3) pulp samples shall be taken of the samples secured and one assayed by each of the parties of the first and second part, and the average of the two shall be final. Provided, however, that if the discrepancies between the two shall be greater than two tenths (.2) per cent as to copper or one (1) ounce as to silver, or three hundredths (.03) ounce as to gold per ton of two thousand (2000) pounds then in each such case the third sample shall be delivered to LUCIUS PITKIN as referee for assay, or to such other referee as may be equally satisfactory to both parties; and the average between his assay and that of the two which is nearest to his shall be accepted by both parties as the correct assay; and all expenses of such **[39]** reference shall be borne by the party whose assay proves farthest from that of the referee's.

The methods to be pursued in determining the copper, silver and gold contents of such deliveries of blister copper shall be those which, after investigation by the chemists of each of the parties of the first and second part shall prove to the satisfaction of all such chemists to give results nearest to the

actual amounts of copper, gold and silver contained in the material received.

V. The party of the second part agrees to purchase and hereby does purchase the said material from the party of the first part upon the terms herein set forth, and agrees to pay to the party of the first part for the same in the manner following:

For all gold at the rate of twenty dollars ($20) per ounce, provided contents are five hundredths (.05) ounce per two thousand (2000) pounds, or above; if contents are below five hundredths (.05) ounce per thousand (2000) pounds, no payment to be made therefor.

For the silver contents in said material if the same amount to one hundred (100) ounces per two thousand (2000) pounds, or less, for all such silver; if said material contains above one hundred (100) ounces per two thousand (2000) pounds, then for ninety-nine (99) per cent of the silver so contained in said material at the average quotation for fine silver as published by the Engineering and Mining Journal of the City of New York for the week during which the material is sampled at the refiners.

For the copper contained in said material on the basis of electrolytic assay, at the average price of electrolytic copper in cakes, wirebars or ingots, as quoted daily in the Engineering and Mining Journal of New York for the week during which the material is sampled at the refiners. If two quotations are given by said Engineering and Mining Journal of New York the mean of the two to be taken as a basis for payment.

The term "week" to be understood as the six days quoted in the Engineering and Mining Journal and running from Thursday to Wednesday.

The party of the second part shall deduct and be entitled to retain from the moneys that may be payable to the party of the first part pursuant to the terms of this contract for the cost of refining such material fifteen dollars ($15) per two thousand (2000) pounds of copper find.

The due dates upon which the party of the second part agrees to account and pay for the material to be as follows:

a. For the gold and silver ninety (90) days from date of arrival of the consignment at Nichols Dock or Siding or lighterage free New York.

b. For the copper sixty (60) days from date of arrival of the consignment at Nichols Dock or Siding, or lighterage free New York. [40]

VI. It is understood and agreed that any and all notices required or permitted to be given to either party under the terms of this contract shall be deemed sufficient if made in writing and delivered at their office in the City of New York.

VII. It is mutually understood and agreed that neither of the parties of the first and second part shall be liable for unavoidable delays in the performance thereof, or for damages as a result of such nonperformance which shall be occasioned by war, labor strikes, fire or accidents arising in their respective works or mines, or on transportation lines

or from other causes over which they have no control.

VIII. Whenever for a continuous period of at least thirty (30) days the price of electrolytic copper in cakes, wirebars or in ingots as quoted in the Engineering and Mining Journal of New York, shall be below ten cents (10¢) per pound, the party of the first part shall have the option to suspend shipments under this agreement, so long as the price of such copper shall continue to remain below ten cents (10¢) per pound, provided it gives the party of the second part written notice of its intention so to do, and in that event the period of three (3) years called for by this agreement shall be extended as much longer as such shipments be so suspended.

IX. If the party of the first part shall be prevented by war, labor, strike, fire, accident or other causes beyond its control from producing any copper during any month, it shall be absolved from making any shipments during such months; but in that event it shall be obligated to resume shipments as soon thereafter as such obstacles have been overcome until the entire quantity called for by this contract shall have been shipped to the party of the second part.

And whenever the party of the second part shall be prevented by war, labor strike, fire, accident or other cause beyond its control from having said copper refined, it shall be absolved from accepting any shipments during the time that such obstacle exists, provided that during such time the party of the second part shall at its own expense furnish a

suitable and safe place for the storage of shipments of the party of the first part under this agreement; but in the event that any such obstacle shall continue to exist for a period longer than sixty (60) days, the party of the first part shall have the privilege of suspending this agreement until the party of the second part shall be able to resume the refining of copper; and in that event, the party of the first part shall, at its option, have the right to make other disposition of its copper until refining can be resumed; and the party of the second part agrees to make all reasonable efforts to resume the refining of the copper under this agreement as quickly as possible by means if the refinery then used or some other refinery; and if any other refinery be used for that purpose the copper shall be shipped to the most convenient spot for delivery at such refinery and any additional expense in the matter of freight or forwarding charges in excess of such freight and forwarding charges to the points above designated shall be borne by the party of the second part.

It is further agreed that if the party of the first part shall be prevented for any of the causes above specified in this article beyond its control from producing any copper for a continuous period of one hundred and twenty (120) days; or if the party of the second part shall be prevented for any of the causes above provided in this article beyond its control from having any shipment **[41]** of copper to it refined as in this agreement provided, for a continuous period of one hundred and twenty (120) days, then in either of such events the other of said

parties of the first or second part, as the case may be, shall have the privilege to terminate this agreement upon giving the party so prevented, ten (10) days' written notice of intention so to do, whereupon this agreement shall at the end of said ten (10) days terminate and be of no further force and effect; except that all outstanding unsettled and unadjusted matters between the parties of the first and second part under this agreement shall thereupon be promptly settled, adjusted, liquidated and paid.

X. In the event that at any time any question or difference shall arise between the parties of the first and second part hereto, growing out of the interpretation of or operation under this contract, such questions shall be disposed of by arbitration.

To that end each of the parties of the first and second part shall within ten (10) days from the time either party declares its intention to arbitrate, appoint an arbitrator who shall hear the evidence and proofs submitted by each of the parties to the controversy, in the city of New York, and such arbitrators shall dispose of such questions within ten (10) days of their appointment and their decision shall be final. In case, however, that the said arbitrators shall be unable to agree, they shall within five (5) days of their inability to agree, appoint an umpire who shall consider the proofs already taken and hear such further proofs or statements as he may desire, and in that event his decision as to the question in controversy shall be final and conclusive and binding upon the parties to this agreement.

XI. And the party of the third part hereto representing that it owns practically all of the stock of the said party of the first part hereto, and owns or controls some of the mines from which the party of the first part is to acquire ore covered by this agreement, and as a further inducement for the party of the second part to enter into this agreement, the party of the third part hereby guarantees to the said party of the second part the prompt and faithful performance by the said party of the first part hereto of all the terms and provisions of this agreement on the part of said party of the first part to be done or performed, and the party of the third part hereto waives notice of each and every default under this agreement on the part of the party of the first part.

XII. It is expressly understood and agreed that the party of the second part may from time to time, as it sees fit, make any advance or loan of money to The Development Company of America, or the party of the third part, upon any terms it thinks proper, and that any advance or loan already or hereafter made by the party of the second part to the Development Company of America, or to the party of the third part shall not in *any affect* this agreement.

XIII. Finally it is mutually agreed that the covenants herein contained shall inure to the benefit of and bind the successors and assigns of the respective parties.

IN WITNESS WHEREOF the parties hereto have caused these presents to be signed and executed in triplicate by their respective corporate offi-

cers and their respective corporate seals to be hereunto affixed by order of their respective Board of Directors [42] the day and year first above written.

SOUTHERN ARIZONA SMELTING COMPANY.

By E. B. GAGE,
President.

(Seal) A. N. GAGE,
Secretary.

Witness:
W. F. STAUNTON.

THE AMERICAN METAL COMPANY, "LIMITED."

By J. LANGELOTH,
President.

(Seal) Attest: JULIUS GOLDMAN,
Secretary.

THE IMPERIAL COPPER COMPANY.

By E. B. GAGE,
President.

(Seal) A. N. GAGE,
Secretary.

W. F. STAUNTON. [43]

8. That thereafter, and on April 13, 1908, the said Imperial Copper Company and the said Southern Arizona Smelting Company entered into another agreement in words and figures following, to wit:

"THIS AGREEMENT made this 13th day of April, 1908, between The Imperial Copper Company, a corporation of Arizona, hereinafter called

"Copper Company" party of the first part, and Southern Arizona Smelting Company, a corporation of Arizona hereinafter called "Smelting Company" the party of the second part, supplemental to the agreement of the 14th day of August, 1906, between same parties.

WITNESSETH: That the Smelting Company desires to increase its present capacity by the addition of a duplicate of the present blast furnace, duplicate of the present blowing engine unit, duplicate of ore bins and all needful accessories, and

WHEREAS the Copper Company, as a part of the original agreement of the 14th day of August, 1906, before mentioned, is willing to furnish the necessary plant and equipment upon the terms and conditions herein set forth.

NOW, THEREFORE, in consideration of the premises and in consideration of one dollar in hand paid by each of the parties hereto, and in further consideration of the carrying out of the covenants and agreements hereinafter made to be kept and performed by the parties hereto respectively, it is agreed as follows, to wit:

The Copper Company agrees that on request of the Board of Directors of the Smelting Company it will cause to be delivered and erected one duplicate of the present blast furnace and one duplicate of the present blowing engine unit and all necessary extensions of buildings, ore bins and other needful accessories, the same to be complete and ready for operation, and agees that it will accept in payment therefor, one thousand shares of the fully paid stock

of the Smelting Company, such shares of stock to be delivered in payment of the property and plant as follows:

When work of construction one quarter completed, two hundred and fifty shares.

When work of construction one half completed, two hundred and fifty shares additional.

When work of construction three quarters completed, two hundred and fifty shares additional.

When work of construction completed, two hundred and fifty shares additional.

The Certificate of the Engineer in Charge of Smelting Company that work has arrived at any of the above stages of completion shall be sufficient evidence to entitle the Copper Company to receive certificates of shares of the stock as above set forth. The Smelting Company hereby agrees to deliver the stock in payment for the construction in the manner and at the times hereinbefore set forth.

IN WITNESS WHEREOF the parties hereto have caused their respective corporate names to be hereto affixed by the President [44] and Secretary of first party, and the Vice-President and Secretary of the second party the day and year above written. All by authority of resolutions passed by the respective Board of Directors of the parties hereto."

That in pursuance of said agreement the Imperial Copper Company did erect such additional plant on the lands of the Smelting Company and the said additional plant was completed and the Smelting

Company did issue to the Copper Company the additional 1000 shares of its capital stock, on or about the 10th day of November, 1908.

9. The smelter plant of the Smelting Company so erected, was situate on said 640-acre tract of land, about ten miles from the mines of the Imperial Copper Company. A railroad, owned by the Arizona Southern Railroad Company, ran from said mines to the smelter, and thence about twelve miles to the station of the Southern Pacific Railroad Company at Red Rock.

The smelter plant of the Southern Arizona Smelting Company was completed and commenced operations about January 1, 1908, and continued in operation until about August 15th, 1910, when the same was closed down, and it has not been operated since.

10. From the time the Smelting Company commenced operating its smelter in 1908, down to the time it ceased operating, in 1910, the Imperial Copper Company shipped to it all of the ores which it extracted from its mines, being over five hundred thousand tons, and the same were smelted and reduced to bullion by the Smelting Company. The ores shipped by the Copper Company were received and smelted by the Smelting Company in accordance with the terms of the said contract between the two companies of date August 14, 1906, aforesaid, and the bullion produced by the Smelting Company was by it sold to the American Metals Company, Ltd., in accordance with the terms of the said contract between the said Smelting Company, said American Metal Company and the Imperial Copper

Company, of date December 16, 1907, aforesaid. [45]

11. The manner in which said business was transacted between said companies under said contracts was as follows:

The Imperial Copper Company shipped its ore to the Smelting Company in carload lots. Both companies made assay of the ore so shipped. The assay of the Smelting Company controlled unless there was a great variation, when the sample of each company was given to an umpire who assayed the same, and the assay of the umpire was taken as final.

Shipments of ore were made every day by the Copper Company to the Smelting Company, and an assay was made of every lot; a lot comprised one or more cars of ore. Smelter returns upon each lot of ore so sampled and assayed by the Smelting Company were made by it; duly signed, checked by its clerks and given to the Imperial Copper Company. Each of said smelter returns was in the following form, as shown by the smelter return of September 10, as follows, to wit: [46]

SOUTHERN ARIZONA SMELTING COMPANY

Sasco, Arizona, September 8th, 1910.

Bought of IMPERIAL COPPER CO.,
Address Silverbell, Arizona.

New York Quotations: Rate Authority: Numbers:
Avg. E. & M. Journal
Date 7/28 to 8/13 Incl.
Silver ..... cts. per oz.
Copper 12.417 cts. per lb. Date Sampled, Aug. 1–13th Incl.

Class Union Ore.
Smelter Lot No. See Under
Shipper's Lot No. "Car No."

CAR WEIGHT.

Init.	No.	Wet	Moist	Dry
Lot	Nos.	3,094,880	5.1	2,936,928
Sm.	Mine			
3926	3697			
3930	3701			
3934	3705			
3938	3709			
3943	3713			
3947	3717			
3965	3736			
3969	3739			

ASSAY

Gold	Silver	Wet Copper
	0.40	3.20

ANALYSIS

Ins.	SiO_2	Fe	Mn.	CaO	Al_2O_3	S.	Zn.
	37.8	16.9		19.1		2.7	

Payments				Per Ton	Total Values
Gold	Ozs.	@ $			
Silver N. P.	Ozs.	%	@ cts.		
Copper 2.32 %	46.4 lbs.	@ 9.917 cts.		4.60	
Fe	%	@	cts.		
Mn	%	@	cts.		
CaO	%	@	cts.		
Copper Credit	% Excess	@	cts.		4.60
Deductions:					
Treatment				2.30	
Insoluble	%	@	cts.		
Silica	%	@	cts.		
Alumina	%	@	cts.		
Sulphur	%	@	cts.		
Zinc	%	@	cts.		
Sintering Concentrates and fine ore					2.30
Price per ton					2.40

Gross Proceeds 1,468,464 Tons @ $2.40 3,524.31
Less Freight from Silverbell: Prepaid.
Less Switching
Less Sampling and Assaying

Balance Due 3,524.31

Correct:
D. G. H.
Invoice Clerk.

Checked:
D. G. H.

Approved:
MEADE GOODLOE,
Superintendent.

[47]

The net value of each ore shipment, so ascertained and shown on each smelter return, was credited to the account of the Imperial Copper Company on the books of the Smelting Company; and the amount was also entered on the books of the Imperial Copper Company, as representing the value of the ore so shipped by the Copper Company to the Smelting Company.

All ore shipments made by the Copper Company to the Smelting Company were handled in the same way, and as to each shipment similar entries to the above were made in the books of each company respectively.

The bullion which resulted from the smelting of these ores, and all other ores smelted by the Smelting Company, was by the Smelting Company shipped and sold to the American Metal Company. The proceeds of these sales were eventually received by the Imperial Copper Company and were by it credited on its books to the account of the Smelting Company.

Upon each shipment of bullion received by the American Metal Company from the Smelting Company, the American Metal Company rendered to the Smelting Company an "Account Sales," accompanying the same with the assay certificate of the bullion, freight bills, advances made thereon, etc., value and net balance due therefor. A copy of one of which said "Account Sales" is in words and figures as follows: [48]

June 4, 1910.

ACCOUNT SALE

FOR THE SOUTHERN ARIZONA SMELTING COMPANY

TOMBSTONE, ARIZONA.

BY THE AMERICAN METAL COMPANY, NEW YORK, N. Y.

			Assay Per Ton.			Total Net Contents.			Value of Contents.	
Lot No.	No. Bars.	Weight.	AU OZ	AG OZ	CU %	AU OZ	AG. OZ	COPPER POUNDS.	AU	AG
197	375	101209	.19	40.10	99.21	9.109	2029.24	100409	182.18	1091.98

COPPER 12676.64

TOTAL VALUE 13,950.80

LESS: Refining..... 753.07
Interest..... 163.19
Freight..... 505.30
Advance.....11700.00 13,121.56

829.24

5/19—5/25/10

GOLD FIGURED AT $20.00

SILVER

Copper..... .53—8125

..... .12—625

[49]

12. The Smelting Company obtained a bill of lading from the Railroad Company for each car of bullion which it so shipped to the American Metal Company, which bill of lading it endorsed and delivered to the Imperial Copper Company with the smelter assay, weight, approximate value, showing the gross value of the bullion, attached thereto; the Imperial Copper Company then drew a draft on the American Metal Company in favor of the Development Company of America for 90% of the gross value, which draft the Copper Company sent to the Development Company of America in New York; and the Copper Company then also drew a draft for like amount on the Development Company of America and deposited the same to its, said Copper Company's credit with the Phoenix National Bank in Arizona.

The amount of the draft, covering the transaction was credited by the Copper Company on its books to the Smelting Company, and the Smelting Company made entry on its books of the total monthly amounts of such drafts as a charge against the Imperial Copper Company. After the American Metal Company rendered its Account Sales for the lot of bullion so shipped, showing the balance due from it on account of each shipment, the said balance was paid to the Imperial Copper Company in like manner as above set forth, and such balance was likewise credited by it on its books to the account of the Smelting Company and each month the Smelting Company charged the Copper Company with the amounts so received by it.

13. The Smelting Company did not keep any bank account with any bank. The method by which it paid its bills, including labor, materials, coke, fuel and all other charges which it had to pay in the conduct of its business was as follows: It made out vouchers which were O. K'd by its superintendent, and he sent them to the Imperial Copper Company with a request to pay [50] them and charge the same to the account of the Southern Arizona Smelting Company. The Imperial Copper Company paid the vouchers, and charged the amount against the Smelting Company, and entries thereof were made on the books of the Imperial Copper Company, showing the transaction; and like entries were made on the books of the Smelting Company.

The Imperial Copper Company did not pay any amounts for the Smelting Company which it did not charge against the Smelting Company.

The accounts between the two companies were balanced monthly.

The Smelting Company kept its own separate books of account and a set of operating books; and entered all items therein, including all items paid for it by the Imperial Copper Company.

14. In addition to smelting the ores for the Imperial Copper Company, the Smelting Company also smelted ores for other persons and corporations, such as the El Tiro Copper Company, the Poland Mining Company, Mackomick Mercantile Company, and others.

A record was kept by the Smelting Company of all ores purchased by it from all such other parties

and corporations, down to the time it ceased operations, which showed in detail the weight of the ore, amount of ore shipped, treatment charge and other deductions, and the balance due to the shipper for the lot so shipped. A smelting return was made by the Smelting Company of each lot of ore so shipped to it for each of such other shippers, and payment for the ore was made of the balance, after making the deductions just mentioned; such return being in a form similar to the smelter return heretofore set forth.

The payment for ore so smelted and purchased from other persons by the Smelting Company was made by an order drawn by it **[51]** upon the Imperial Copper Company, and this order was paid by the Imperial Copper Company and was charged against the account of the Smelting Company.

15. In conducting its smelting operations, the Smelting Company purchased flux, that is, iron, lime and sulphur, and this expense for flux was a part of the expense of the smelter operations, the same as labor. Coke was also purchased by the Smelting Company and from January, 1908, to September 30, 1910, coke of the value of over $500,000.

This coke and flux was also paid for by vouchers drawn by the Smelting Company from time to time, on the Imperial Copper Company and the Imperial Copper Company paid the same and charged the amount upon its books against the Smelting Company, in its account against it; the Smelting Company also kept an account thereof on its books.

16. The books of both companies further show

that after the smelting plant of the Smelting Company was closed down, the Smelting Company continued to present vouchers for labor, material and other items of like nature, to the Imperial Copper Company, with its request that it pay the same, and that the said Imperial Copper Company did pay the same, so that on the 5th day of July, 1911, when the petition in bankruptcy was filed against the Imperial Copper Company, the Imperial Copper Company, as shown by its books, had paid out for the Smelting Company a total of $26,887.71 in excess of all the amounts of money which it had credited to the account of the Smelting Company, so that on said date there remained, according to said books, a balance due from the Smelting Company to the Imperial Copper Company of said sum of $26,887.71.

[52]

17. That on the 5th day of July, 1911, certain creditors of the Imperial Copper Company filed with the District Court of the First Judicial District of the Territory of Arizona their petition to have said Imperial Copper Company declared a bankrupt, and thereafter, and on the 25th day of July, said Imperial Copper Company was declared a bankrupt, and thereafter, and on the 12th day of August, 1911, M. P. Freeman was duly elected the Trustee in Bankruptcy of said Imperial Copper Company; that he qualified as such on the 26th day of August, 1911.

That on the 23d day of January, 1912, said M. P. Freeman, as Trustee in Bankruptcy of the Imperial Copper Company, Bankrupt, brought suit against said Southern Arizona Smelting Company, before

the District Court of the First Judicial District of the Territory of Arizona, in and for Pima County, wherein, as such Trustee, he sought to recover from said Smelting Company the sum of $26,887.71, with interest thereon, being the said balance so advanced or paid by the Imperial Copper Company for the said Smelting Company, and being the total amount which the books of each of said companies showed was due from the said Smelting Company to said Imperial Copper Company, which said suit is still pending before the Superior Court of Pima County, for the State of Arizona, the successor of said Territorial District Court, aforesaid, and is still undetermined.

18. That thereafter, and on the 17th day of June, 1914, the said Trustee in Bankruptcy of the Imperial Copper Company did, under the order of the bankruptcy court wherein the said bankruptcy proceeding was pending, to wit, the United States District Court for the District of Arizona, upon application therefor, made by certain creditors of said Imperial Copper Company, bankrupt, cause a writ of attachment to issue in the said suit then pending in the Superior Court of Pima County, [53] State of Arizona, aforesaid, against said Southern Arizona Smelting Company, and did, on the 19th day of June, 1914, cause said writ of attachment to be levied upon all of the real property of said Southern Arizona Smelting Company, which said writ of attachment is still pending.

19. That on the 17th day of June, 1914, the said M. P. Freeman did resign as Trustee in Bankruptcy

of the said Imperial Copper Company, bankrupt, which resignation was accepted by the United States District Court for the State of Arizona, on July 1, 1914, and on said day John H. Martin, the petitioner in the present proceeding, was elected and appointed Trustee in Bankruptcy of the said Imperial Copper Company, bankrupt, to fill the vacancy caused by the resignation of said M. P. Freeman, as such, and on July 2, 1914, said John H. Martin duly qualified as such trustee in bankruptcy of said Imperial Copper Company, and ever since has been and now is the trustee in bankruptcy of said Imperial Copper Company, bankrupt.

20. That the flue dust and slag dump, which is the subject matter of the present controversy, were the residuum or residue which arose from the smelting of ores by the said Southern Arizona Smelting Company from the period when it commenced its smelting operations in 1908, down to the time it closed down its plant in 1910, and was created in the following manner:

The ores received by the Smelting Company were placed in its smelter, together with coke and flux. The coke was ignited and a blast of air was turned on to the mass; the fine particles of ore and coke were thereby blown into a stack, which stack ended in a chamber, in which chamber the dust was collected continuously during the smelting operations, and this dust constitutes [54] the flue dust, the subject matter of this action, and the pile thereof now amounts to between 9,000 and 10,000 tons.

The ores being smelted or melted, the copper or

bullion or metal contents were drawn off, which resulted in bullion, and the residue was drawn off, which constituted the slag; this slag was collected in a dump, and constitutes the slag dump in controversy in this action, amounting to many thousand of tons of slag.

21. Upon the Smelting Company shutting down its plant and ceasing operations, on August 15, 1910, George W. Dietz, secretary and acting manager of said corporation, took possession of all of its property, including the said flue dust and slag dump, was situate on the real property of said corporation, at its smelting plant at Sasco, Arizona; and he remained in actual charge and control thereof, for said Smelting Company, until the said Smelting Company was declared a bankrupt, and a trustee in bankruptcy was appointed for it, when he delivered possession thereof to the trustee in bankruptcy of said Smelting Company on or about the 31st day of October, 1914.

And during all of said times, to wit, from the time that said Dietz took possession of the property for the said Smelting Company in August, 1910, down to the said 31st day of October, 1914, when said Trustee in Bankruptcy of the Southern Arizona Smelting Company was appointed and qualified, the said Southern Arizona Smelting Company had possession and claimed the ownership of the said flue dust and the said slag dump.

22. That the said M. P. Freeman, as Trustee in Bankruptcy of the Imperial Copper Company at no time, from his appointment as such in July, 1911,

down to the time that he resigned said trust in July, 1914, ever took possession of or claimed possession [55] or title to the said flue dust or the said slag dump, as being the property of said Imperial Copper Company, bankrupt.

That on July 10, 1910, claims of creditors aggregating about one million two hundred thousand dollars had been filed with the Referee in the matter of Imperial Copper Company, bankrupt; that on said day certain of said creditors, whose claims aggregated about $40,000 served a written notice on M. P. Freeman, as Trustee in Bankruptcy of said Imperial Copper Company, requesting him "to take possession and control, as a part of the assets of the Imperial Copper Company, a corporation, bankrupt herein, of all of the assets of the Southern Arizona Smelting Company, which consist of a smelting plant, real estate, machinery and equipment, slag dump, etc., situate in Sasco, in Pinal County, Arizona." Which said trustee, acting under the advice of Selim M. Franklin, Esq., his attorney, refused to do, upon the ground that the property mentioned in said request was the property of said Southern Arizona Smelting Company and not the property of said Imperial Copper Company;

That on the 20th day of September, 1911, the appraiser appointed in the matter of the Imperial Copper Company, bankrupt, filed their appraisement and report, wherein, they did estimate and appraise, among other items the following:

"Southern Arizona Smelting Co. Real estate; machinery and equipment, $125,000."

23. On or about July 5th, 1914, the said John H. Martin, as Trustee in Bankruptcy of the said Imperial Copper Company, after being qualified as such, went to the said smelting plant, aforesaid, where the said slag dump and flue dust were, and took possession, or attempted to take possession, thereof, by posting notices stating that he had taken possession, and by leaving a keeper on the ground, who remained there until on or about the [55½] 31st day of October, 1914, when M. P. Freeman qualified as the Trustee in Bankruptcy of said Southern Arizona Smelting Company, and took possession of the property of said Smelting Company as such Trustee in Bankruptcy. But during the time that said John H. Martin, as Trustee, had a keeper or custodian on the ground, the said Southern Arizona Smelting Company also had a keeper or custodian, who also claimed to be in possession of said flue dust and slag dump.

24. Between the time that the Smelting Company was organized and down to the time it was adjudicated a bankrupt, on September 29, 1914, it declared only one dividend to its stockholders, to wit, on the 31st day of October, 1909, the amount of said dividend being the sum of $49,853.62. This dividend was paid to the Imperial Copper Company, as it appeared at that time as the registered owner on the books of said Smelting Company, as the owner of all the stock of said Smelting Company.

25. That after the levy of the attachment, aforesaid, in July, 1914, upon the real property of the said Smelting Company in the said suit of the Trus-

tee in Bankruptcy of the Imperial Copper Company against said Smelting Company, to wit, on the 29th day of September, 1914, said Smelting Company filed its voluntary petition in bankruptcy in the District Court of the United States for the District of Arizona, in the present proceeding, and on said day was by the Court adjudicated a bankrupt; that thereafter, and on the 31st day of October, 1914, M. P. Freeman duly qualified as the Trustee in Bankruptcy of said Smelting Company, and ever since has been and now is the Trustee in Bankruptcy of said Southern Arizona Smelting Company.

26. That on the 25th day of August, 1915, the said [56] John H. Martin, Trustee in Bankruptcy of said Imperial Copper Company did file with the Referee of this court, in the matter of the bankruptcy of said Southern Arizona Smelting Company, bankrupt, the said claim of the Imperial Copper Company, bankrupt, for the said balance of account of $26,887.71, with interest, claimed to be due the estate of said Imperial Copper Company, bankrupt, from the said Southern Arizona Smelting Company, bankrupt, which said claim was filed as a secured claim; said claim being the same claim for which suit was brought by the Trustee in Bankruptcy of the Imperial Copper Company against the said Southern Arizona Smelting Company, in the year 1911, heretofore referred to, and which suit is still pending.

29. That in addition to said claim of Imperial Copper Company, bankrupt, so filed and allowed as aforesaid, the following claims against the said

Southern Arizona Smelting Company, bankrupt, have also been filed with the said Referee, as claims against said Southern Arizona Smelting Company, bankrupt, and have been by him duly allowed, to wit:

Name of Creditor.	Amount of Claim.	
Consolidated National Bank.	$20,000.00	and interest
Aubrey & Semple.....	1,894.12	" "
Colorado Fuel & Iron Company	27,759.71	" "
F. M. Murphy	4,897.59	
B. P. Cheney	3,073.81	
Poland Mining Company....	311.05	
F. M. Murphy and B. P. Cheney	1,500.00	and interest
Louis St. Louis	400.00	
George W. Dietz	400.00	
	60,238.28	[57]

28. That on or about the 13th day of April, 1908, the Imperial Copper Company duly authorized its president to enter into an agreement with the Bankers Trust Company, as Trustee for the bondholders of the bonds authorized to be issued as aforesaid, whereby the Imperial Copper Company should mortgage or pledge to the Bankers Trust Company, as further security for said bonds, all of the shares of the capital stock of the Smelting Company which it, the Copper Company, owned, being about 9,000 shares, in consideration of the Bankers Trust Company, as Trustee, releasing the lien of its trust deed or mortgage upon the said 640 acres of land which

the Copper Company had agreed to convey, or had conveyed to the Smelting Company.

29. That thereafter, and in pursuance of said authority, the Bankers Trust Company did release its lien on the said 640 acres of land, aforesaid, and the Imperial Copper Company did assign and pledge to said Bankers Trust Company and deliver to it, as Trustee, all of the shares of the capital stock of the Smelting Company, which said Copper Company owned, being, as aforesaid, about 9,000 shares, being all of the issued capital stock of said Smelting Company, except the five shares issued to authorize the directors to act as such.

That on the 21st day of December, 1908, the Imperial Copper Company duly executed to the Bankers Trust Company, Trustee for the bondholders, as aforesaid, an instrument in writing, which, amongst other things, contained the following provision:

> "That for and in consideration of one dollar by the party of the second part (Bankers Trust Co.) to the party of the first part (Imperial Copper Co.) in hand paid, the receipt of which is hereby acknowledged, and for and in consideration of other valuable considerations moving from the Trustee and from the bondholders to the Company, the receipt of which are also acknowledged, the said Company deposits at the execution of this instrument, with the Trustee, duly assigned to such Trustee, all of the stock of the said Arizona Southern Railroad Company and all of the outstanding stock of said [58] Southern Arizona Smelting Company;

that is to say, 8,000 shares of said Railroad Company, and 9,000 shares of said Smelting Company, as additional collateral to secure the payment of the principal and interest of any bonds at any time issued and outstanding under the aforesaid indenture; and the Company (Imperial Copper Co.) party of the first part, has sold, assigned and transferred, and by these presents does sell, assign and transfer unto the party of the second part (Bankers Trust Co.) Trustee, its successors and assigns forever, all the rights, title and interest which the Company (Imperial Copper Co.) has or shall be entitled to, in said stock, in the same manner, and to the same effect as if said shares of stock had originally been deposited as part of the collateral or security under the aforesaid mortgage indenture . . . It is further understood and agreed that this agreement is subject to all the terms of said indenture (or trust deed) and especially to Article VIII thereof."

That the certificates for the shares of stock, which theretofore had been issued by the Smelting Company to the Imperial Copper Company, and which were so pledged as aforesaid, were not transferred on the books of said Southern Arizona Smelting Company until the 20th day of June, 1911, when the same were surrendered to said Smelting Company and new certificates therefor were issued by it to said Bankers Trust Company; that at all times prior to said 20th day of June, 1911, the said Imperial Copper Company voted the said shares of stock at all

stockholders meetings of the Smelting Company.

30. That thereafter, and on or about the 21st day of December, 1908, and in pursuance of the agreement just above mentioned, and contemporaneously with the execution thereof, the Imperial Copper Company delivered to the Bankers Trust Company proper certificates for all of the shares of stock mentioned in said agreement, said certificates being then and there duly assigned in blank by the registered holder thereof, in the usual form for stock exchange delivery. Said certificates, so assigned, remained in the exclusive possession of the Bankers [59] Trust Company until on or about June 20, 1911, when the same were by the Bankers Trust Company surrendered for cancellation and reissue, whereupon the same were cancelled and reissued, in the name of Bankers Trust Company, as Trustee. And said stock was thereupon transferred and reissued on the books of the said Smelting Company, in the name of Bankers Trust Company, as such Trustee, and proper certificates for said stock were issued and delivered to said Bankers Trust Company, as Trustee under said mortgage, and remained in the exclusive possession of the Bankers Trust Company until the same were delivered by it to the Receiver of the Imperial Copper Company, appointed by the District Court of the First Judicial District of the Territory of Arizona, in and for the county of Pima, in a certain foreclosure suit brought by said Bankers Trust Company against the Imperial Copper Company to foreclose the said mortgage and the lien

of the collateral security aforesaid, as hereinafter set forth.

31. That on the 3d day of July, 1911, the Bankers Trust Company filed a suit before the District Court of the First Judicial District of the Territory of Arizona against the said Imperial Copper Company, wherein it sought to foreclose the said deed of trust, and its said lien upon said shares of stock, so pledged with it, as aforesaid, by reason of default having been made in the payment of the interest on the $2,000,000 of bonds issued by the Imperial Copper Company, and secured by said mortgage or deed of trust, and by said shares of stock.

32. That the said John H. Martin, as Trustee in Bankruptcy of said Imperial Copper Company, did, on the 9th day of July, 1914, file in the Superior Court of the State of Arizona, in and for the County of Pima, being the successor of the [60] District Court of the First Judicial District of the Territory of Arizona, aforesaid, his petition in the said suit of Bankers Trust Company vs. Imperial Copper Company, to foreclose the said mortgage and lien, as aforesaid, wherein he prayed for an order authorizing him, said John H. Martin, as Trustee in Bankruptcy of the Imperial Copper Company, to appear and intervene in and make defense to said action; which petition was thereafter granted, and the said John H. Martin, as Trustee, did file his answer in the said action of said Bankers Trust Company against said Imperial Copper Company, wherein he did, amongst other things, claim, as such Trustee, the right to the custody and control of all

of the shares of stock aforesaid, of said Southern Arizona Smelting Company, and did deny the validity of the lien thereon of the Bankers Trust Company and the validity of the assignment and transfer of said shares to said Bankers Trust Company, security as aforesaid.

33. That thereafter, and on the 28th day of December, 1914, findings of fact and conclusions of law and judgment were duly made, entered and rendered by the said Superior Court of the County of Pima, State of Arizona, in the said suit of Bankers Trust Company, plaintiff, against Imperial Copper Company, defendant, and John H. Martin, Trustee in Bankruptcy of the Imperial Copper Company, a corporation, Intervenor, wherein that court did adjudge that said Bankers Trust Company should recover from the Imperial Copper Company the sum of $2,701,452.32 and costs, with interest, the payment of all of which was agreed to be secured by the lien of the said mortgage, supplemental agreement and pledge of stock hereinbefore mentioned, and did further adjudge that the said 9,000 shares of the capital stock of said Southern Arizona Smelting Company were duly pledged by the Imperial Copper Company to said Bankers Trust [61] Company, as Trustee, and that the certificates therefor were all in the custody and control of the Receiver of said court; it was further adjudged, amongst other things, that the lien and pledge upon said shares of stock should be foreclosed and that said shares of stock should be sold by a Special Master, appointed by the Court, the proceeds of the sale

to be applied as in said judgment and decree directed, from which said judgment the said John H. Martin, Trustee, appealed to the Supreme Court of Arizona, and which appeal is now pending and undetermined.

34. That thereafter, and in pursuance of said judgment and decree of said Superior Court, the Special Master of said court did sell all of the said 9,000 shares of the capital stock of said Southern Arizona Smelting Company, being all of the issued and outstanding shares of stock of said company, to one Leo Goldschmidt; that said sale was confirmed by said Superior Court, and thereafter, and on the 19th day of April, 1915, the said Special Master did execute an assignment and bill of sale, selling, assigning and transferring to said Leo Goldschmidt all of the said shares of stock of the said Southern Arizona Smelting Company which theretofore had been owned by the Imperial Copper Company, and had been by it pledged as collateral security with the said Bankers Trust Company, as aforesaid.

35. That in the said suit of Bankers Trust Company for the foreclosure of said trust deed and said pledge of stock, aforesaid, said Superior Court did make and file findings of fact which are binding and conclusive upon John H. Martin, Trustee of Imperial Copper Company, in the present case, he having been a party to the suit aforesaid.

That amongst other things the said Superior Court in said suit aforesaid, did adjudge and find as a fact the following:

That on or about December 21, 1908, said Imperial

Copper Company duly assigned to the Bankers Trust Company all of the [62] capital stock, consisting of 9,000 shares, of the Southern Arizona Smelting Company, as additional collateral to secure the payment of the principal and interest of the said bonds, aforesaid, and that contemporaneously therewith said Imperial Copper Company did deliver to the Bankers Trust Company proper certificates for all of said shares of stock, duly assigned in blank by the registered holder thereof, in the usual form for stock exchange delivery; that said certificates so assigned, remained in the possession of the Bankers Trust Company until on or about June 20, 1911, when the same were surrendered by it for cancellation and reissue, whereupon the same were cancelled and were reissued to said Bankers Trust Company as Trustee, and said stock was thereupon transferred and reissued on the books of said Southern Arizona Smelting Company to said Bankers Trust Company as Trustee, and proper certificates of stock were issued and delivered to it, as Trustee under the said mortgage, and that at the time of the commencement of the said action to foreclose said mortgage and deed of trust and lien aforesaid, the said Bankers Trust Company was the duly registered holder of all of the stock of said Southern Arizona Smelting Company, except as to qualifying shares for directors, certificates for which the said Bankers Trust Company holds in its custody, duly assigned.

Said Court further found as a fact: The Development Company of America being then the owner

and holder of a majority of the bonds issued under said mortgage and being also the owner and holder of a controlling interest in the capital stock of defendant (Imperial Copper Company) had theretofore loaned certain moneys to defendant (Imperial Copper Company) represented by its promissory notes delivered to said Development Company, and defendant (Imperial Copper Co.) was then in need of additional funds which it sought to borrow from said Development Company. It was necessary for the Development Company to borrow any funds [63] which it might lend to defendant (Imperial Copper Co.) and to deposit as collateral for the payment of such sums, the bonds and promissory notes of the defendant (Imperial Copper Co.) held by the Development Company.

At the suggestion of the Development Company, the defendant (Imperial Copper Company) executed and delivered the supplemental agreement together with the certificate of stock therein mentioned to the trustee (Bankers Trust Company) and the Development Company thereafter borrowed further sums of money upon said bonds and notes as collateral security and loaned large sums thereof to the defendant (Imperial Copper Co.). The shares of the capital stock of the Smelting Company were assigned and delivered to plaintiff as trustee upon the further consideration that the trustee should release from the lien of the mortgage, certain real estate upon which it was intended by the Smelting Company to construct its smelter; said real estate was thereupon so released and conveyed to the

Smelting Company, and the Smelting Company thereafter erected its smelter thereon. The bonds described in and issued under said mortgage are held and owned by upwards of fifty different individuals and corporations.

36. That on the 3d day of July, 1911, M. P. Freeman was appointed Receiver of said court, to take possession of all of said mortgaged property, and the said shares of stock, and that, as such Receiver, he did take possession, amongst other things, of the said shares of stock of said Southern Arizona Smelting Company, and the same had at all times been subject to his control and the order of said court.

That the Superior Court did, on the 28th day of December, 1914, in the case aforesaid, render its judgment and decree foreclosing the lien and pledge upon said shares of stock, and directing the same to be sold by the said Receiver, as Special **[64]** Master of said court, and the same were thereafter sold by said Receiver and Special Master to Leo Goldschmidt, and said sale was confirmed by said Superior Court, and an assignment of said shares was made by said Receiver and Special Master, to said Leo Goldschmidt, on the 19th day of April, 1915, and neither the Imperial Copper Company nor the said Bankers Trust Company nor John H. Martin, as Trustee in Bankruptcy of said Imperial Copper Company, have any right, title or interest, in or to the said shares of the capital stock of said Southern Arizona Smelting Company, or any thereof.

Dated at Tucson, Arizona, this 14th day of June, 1916.

WM. H. SAWTELLE,
Judge.

[Endorsements]: In the U. S. District Court, District of Arizona. In the Matter of The Southern Arizona Smelting Company, a Corporation, Bankrupt. Findings of Fact. Slag Dump and Flue Dust. Filed June 14th, A. D. 1916. Mose Drachman, Clerk. **[65]**

In the United States District Court, for the District of Arizona.

IN EQUITY—No. E–47 (TUCSON).

In the Matter of SOUTHERN ARIZONA SMELTING COMPANY, a Corporation,
Bankrupt.

JOHN H. MARTIN, Trustee in Bankruptcy of IMPERIAL COPPER COMPANY, a Corporation, Bankrupt,
Plaintiff,

vs.

M. P. FREEMAN, Trustee in Bankruptcy of SOUTHERN ARIZONA SMELTING COMPANY, a Corporation,
Defendant.

Conclusion of Law.

The Court having heretofore made and filed its Findings of Fact in the above-entitled matter, does

now make its Conclusions of Law therefrom, as follows:

CONCLUSIONS OF LAW.

That the Southern Arizona Smelting Company, a corporation, was a subsidiary of the Imperial Copper Company, a corporation, created and used by the Imperial Copper Company for its convenience in the transaction of its business; that said Imperial Copper Company was the parent corporation of said Southern Arizona Smelting Company, and used said Southern Arizona Smelting Company as an adjunct, agent and instrumentality in the transaction of its business.

That all of the ores shipped by the Imperial Copper Company to the Southern Arizona Smelting Company, and the title thereto, as well as the title to all of the flue dust and slag dump arising from the smelting of said ores by the Southern [66] Arizona Smelting Company remained in the Imperial Copper Company; that the contract under which said ores were so shipped by the Imperial Copper Company, and smelted by the Southern Arizona Smelting Company, constituted a bailment and not a sale; that said slag dump and flue dust is the property of the estate of the Imperial Copper Company, bankrupt, and John H. Martin, as Trustee in Bankruptcy of said Imperial Copper Company, bankrupt, is entitled to the possession of said property; and that the estate of said Southern Arizona Smelting Company has no title or right to the said slag dump and flue dust and that said M. P. Freeman, as Trustee in Bankruptcy of said South-

ern Arizona Smelting Company, bankrupt, has no right, title or interest in or to any of said property, and is not entitled to the possession thereof.

Dated at Tucson, Arizona, this 14th day of June, 1916.

WM. H. SAWTELLE,
Judge.

[Endorsements]: In the U. S. District Court, District of Arizona. In the Matter of Southern Arizona Smelting Company, a Corporation, Bankrupt. Conclusions of Law. Filed June 14th, A. D. 1916. Mose Drachman, Clerk. **[67]**

In the United States District Court, for the District of Arizona.

IN EQUITY—No. E–47 (TUCSON).

JOHN H. MARTIN, Trustee in Bankruptcy of THE IMPERIAL COPPER COMPANY, a Corporation, Bankrupt,
Plaintiff,

vs.

M. P. FREEMAN, Trustee in Bankruptcy of THE SOUTHERN ARIZONA SMELTING COMPANY, a Corporation, Bankrupt,
Defendant.

Decree.

This cause coming on to be further heard at this term on the 14th day of June, A. D. 1916, the same having been heretofore argued by respective counsel and submitted to the Court; and the parties having

heretofore stipulated and agreed in open court to the findings of fact herein, which said findings of fact the Court did adopt and file as its findings of fact herein; the plaintiff appearing by his counsel, Francis M. Hartman, Esq., and Edwin F. Jones, Esq., and the defendant appearing by his counsel, Selim M. Franklin, Esq., and the Court being now fully advised in the premises, thereupon, upon consideration thereof, it was ordered, adjudged and decreed, as follows:

(1) That the estate of said The Imperial Copper Company, a corporation, bankrupt, is the owner of all of that certain property mentioned and described in the petition of John H. Martin, Trustee in Bankruptcy of the Estate of The Imperial Copper Company, a corporation, bankrupt, on file herein, to wit:

A certain lot of flue dust, estimated to contain ten thousand (10,000) tons, more or less; and also a certain slag dump, all situated at the smelting plant of said Southern Arizona Smelting Company, a corporation, bankrupt, at the town of Sasco, Pinal County, Arizona, and that the said John H. Martin, Trustee in Bankruptcy of the estate of said **[68]** Imperial Copper Company, a corporation, bankrupt, is entitled to the possession of all of said flue dust and slag.

(2) IT IS FURTHER ORDERED, ADJUDGED AND DECREED that neither the estate of the said Southern Arizona Smelting Company, a corporation, bankrupt, nor the said M. P. Freeman, Trustee in Bankruptcy of the said estate of the Southern

Arizona Smelting Company, a corporation, bankrupt, has any right, title or interest whatsoever in or to any of said flue dust or said slag, and that the said M. P. Freeman, as such trustee of the Southern Arizona Smelting Company, a corporation, bankrupt, is not entitled to the possession of the same.

(3) IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the said M. P. Freeman, Trustee in Bankruptcy of said Southern Arizona Smelting Company, a corporation, bankrupt, be and he hereby is ordered and directed to turn over and deliver unto the said John H. Martin, Trustee in Bankruptcy of the estate of said Imperial Copper Company, a corporation, bankrupt, all of said flue dust and slag, and

(4) IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the said John H. Martin, Trustee in Bankruptcy of the estate of said Imperial Copper Company, a corporation, bankrupt, do have and recover of and from the estate of said Southern Arizona Smelting Company, a corporation, bankrupt, and from M. P. Freeman, Trustee in Bankruptcy of said estate of said Southern Arizona Smelting Company, a corporation, bankrupt, his costs and disbursements incurred herein, amounting to the sum of Ten ($10.00) Dollars.

Done in open court this 14th day of June, A. D. 1916.

WM. H. SAWTELLE,
Judge.

[Endorsements]: No. E.——. In the United States District Court for the District of Arizona.

John H. Martin, Trustee, etc., Plaintiff, vs. M. P. Freeman, Trustee, etc., Defendant. Decree. Filed June 14th, A. D. 1916. Mose Drachman, Clerk. [69]

In the United States District Court, for the District of Arizona.

MINUTE ENTRY—June 14, 1916.

In the Matter of SOUTHERN ARIZONA SMELTING COMPANY, a Corporation, Bankrupt.

JOHN H. MARTIN, Trustee in Bankruptcy of IMPERIAL COPPER COMPANY, a Corporation, Bankrupt,

Plaintiff,

vs.

M. P. FREEMAN, Trustee in Bankruptcy of SOUTHERN ARIZONA SMELTING COMPANY, a Corporation,

Defendant.

Order Allowing Appeal.

Upon the rendering of the decree herein in the above-entitled cause on this date, M. P. Freeman, Trustee of Southern Arizona Smelting Company, a corporation, Bankrupt, defendant, by Selim M. Franklin, his solicitor and attorney, gave notice in open court of his appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the said judgment and decree of this court, and at the same time did file herein his assignments of error.

The Court did then order, as no bond was required from said Trustee, that an appeal to the United

States Circuit Court of Appeals for the Ninth Circuit from the judgment and decree this day rendered herein, be, and the same is hereby allowed to the said M. P. Freeman, Trustee of Southern Arizona Smelting Company, a corporation, Bankrupt, defendant, and that a certified transcript be transmitted to the United States Circuit Court of Appeals for the Ninth Circuit, as provided by law and the rules of said court.

[Endorsements]: In the U. S. District Court for the District of Arizona. In the Matter of Southern Arizona Smelting Co., a Corporation, Bankrupt, John H. Martin, Trustee of Imperial Copper Company, a Corporation, Bankrupt, Plaintiff, vs. M. P. Freeman, Trustee of Southern Arizona Smelting Company, a Corporation, Bankrupt, Defendant. Minute Entry on Appeal. [70]

In the United States District Court, for the District of Arizona.

IN EQUITY—No. E–47 (TUCSON).

In the Matter of SOUTHERN ARIZONA SMELTING COMPANY, a Corporation, Bankrupt.

JOHN H. MARTIN, Trustee in Bankruptcy of IMPERIAL COPPER COMPANY, a Corporation, Bankrupt,

Plaintiff,

vs.

M. P. FREEMAN, Trustee in Bankruptcy of SOUTHERN ARIZONA SMELTING COMPANY, a Corporation, Bankrupt,

Defendant.

Assignments of Error of M. P. Freeman, Trustee in Bankruptcy of Southern Arizona Smelting Company, a Corporation, Bankrupt.

Comes now on this 14th day of June, 1916, defendant M. P. Freeman, Trustee in Bankruptcy of Southern Arizona Smelting Company, a corporation, Bankrupt, and files in open court the following Assignments of Error upon which he will rely upon the prosecution of his appeal in the above-entitled cause, being the appeal from the judgment and decree entered herein by the above-entitled court on this 14th day of June, 1916.

I.

The Court erred in its conclusions of law from the Findings of Fact as made and filed herein, which said conclusions of law, so assigned as erroneous, are as follows:

"That the Southern Arizona Smelting Company, a corporation, was a subsidiary of the Imperial Copper Company, a corporation, created and used by the Imperial Copper Company for its convenience in the transaction of its business; that said Imperial Copper Company was the parent corporation of said Southern Arizona Smelting [71] Company and used said Southern Arizona Smelting Company as an adjunct, agent and instrumetality in the transaction of its business.

"That all of the ores shipped by the imperial Copper Company to the Southern Arizona

Smelting Company, and the title thereto, as well as the title to all of the flue dust and slag dump arising from the smelting of said ores by the Southern Arizona Smelting Company remained in the Imperial Copper Company; that the contract under which said ores were so shipped by the Imperial Copper Company, and smelted by the Southern Arizona Smelting Company, constituted a bailment and not a sale; that said slag dump and flue dust is the property of the estate of the Imperial Copper Company, Bankrupt, and John H. Martin, as Trustee in Bankruptcy of said Imperial Copper Company, Bankrupt, is entitled to the possession of said property; and that the estate of said Southern Arizona Smelting Company has no title or right to the said slag dump and flue dust and that said M. P. Freeman, as Trustee in Bankruptcy of said Southern Arizona Smelting Company, Bankrupt, has no right, title or interest in or to any of said property, and is not entitled to the possession thereof."

II.

The Court erred, under the findings of fact as agreed to and filed herein, in finding, adjudging and decreeing that the estate of the Imperial Copper Company, a corporation, bankrupt, is the owner, and that John H. Martin, as Trustee in Bankruptcy of the Imperial Copper Company, a corporation, bankrupt, is entitled to the possession of said flue dust and slag dump mentioned in said decree; and in not adjudging and decreeing the estate of the

Southern Arizona Smelting Company, a corporation, bankrupt, to be the owner thereof, and M. P. Freeman, its Trustee in Bankruptcy, to be entitled to the possession thereof.

III.

The Court erred in adjudging and decreeing that neither the estate of the said Southern Arizona Smelting Company, a corporation, bankrupt, nor the said M. P. Freeman, Trustee in Bankruptcy of the said estate of said Southern Arizona Smelting Company a corporation, bankrupt, has any right, title, or interest whatsoever in said flue dust or slag dump, and in further adjudging and decreeing that said M. P. Freeman, as such Trustee, was not entitled to the possession of the same; and in ordering and directing the said M. P. Freeman, as Trustee, as aforesaid, to turn over and deliver unto the [72] said John H. Martin, Trustee in Bankruptcy of the estate of said Imperial Copper Company, a corporation, bankrupt, all or any of said flue dust and slag.

IV.

The Court erred, under the findings of fact as made and found by the Court, in not adjudging and decreeing that the title and ownership of said slag dump and flue dust was in the Southern Arizona Smelting Company; and that the title and right of possession thereto passed to said M. P. Freeman, as its Trustee in Bankruptcy, to be administered as part of the assets of said bankrupt estate.

V.

That under the findings of fact as made and found by the Court in this case, said M. P. Freeman, as

Trustee of Southern Arizona Smelting Company, a corporation, bankrupt, was entitled to a judgment and decree, adjudging him as such Trustee to be vested with the title to said slag dump and flue dust and adjudging him to be entitled to the possession thereof, as such Trustee, to be administered upon as part of the assets of said bankrupt estate, and the Court erred in not rendering its judgment under the facts as found by the Court, in favor of said M. P. Freeman, as such Trustee, as aforesaid.

WHEREFORE, the said M. P. Freeman, as Trustee, as aforesaid, prays that the judgment and decree herein be reversed, and that a mandate issue directing that said District Court of the United States for the District of Arizona, to enter judgment and decree adjudging and decreeing the said M. P. Freeman, as Trustee of Southern Arizona Smelting Company, a corporation, bankrupt, to be vested with the title, and to be entitled to the possession [73] of the said slag dump and flue dust, and that the said John H. Martin, as Trustee of the said Imperial Copper Company, a corporation, bankrupt, has no title or right of possession thereof.

SELIM M. FRANKLIN,

Attorney for M. P. Freeman, Trustee of Southern Arizona Smelting Company, a Corporation, Bankrupt, Defendant.

[Endorsements]: In the U. S. District Court for the District of Arizona. In the Matter of Southern Arizona Smelting Co., a Corporation, Bankrupt, John H. Martin, Trustee of Imperial Copper Com-

pany, a Corporation, Bankrupt, Plaintiff, vs. M. P. Freeman, Trustee of Southern Arizona Smelting Company, a Corporation, Bankrupt, Defendant. Assignments of Error of M. P. Freeman, Trustee in Bankruptcy of Southern Arizona Smelting Company. Copy deceived June 14, 1916. Francis H. Hartman, Atty. for Ptff. Filed June 14th, A. D. 1916. Mose Drachman, Clerk. **[74]**

In the United States District Court, for the District of Arizona.

In the Matter of SOUTHERN ARIZONA SMELTING COMPANY, a Corporation, Bankrupt.

JOHN H. MARTIN, Trustee in Bankruptcy of IMPERIAL COPPER COMPANY, a Corporation, Bankrupt,

Plaintiff,

vs.

M. P. FREEMAN, Trustee in Bankruptcy of SOUTHERN ARIZONA SMELTING COMPANY, a Corporation, Bankrupt,

Defendant.

Notice of Appeal.

Now comes the above-named M. P. Freeman, Trustee in Bankruptcy of Southern Arizona Smelting Company, a corporation, bankrupt, defendant herein, by Selim M. Franklin, his attorney, in open court, on this 14th day of June, 1916, and at the time of the rendition and signing of the judgment and decree in the above-entitled case, and conceiving

himself aggrieved by the judgment and decree rendered by the Court herein, does hereby appeal from the said decree and the whole thereof, to the United States Circuit Court of Appeals for the Ninth Circuit, and he prays that this appeal may be allowed and that a transcript of the record and proceedings and papers upon which said decree was made, duly authenticated, may be sent to the Circuit Court of Appeals.

SELIM M. FRANKLIN,

Solicitor for M. P. Freeman, Trustee of Southern Arizona Smelting Company, a Corporation, Bankrupt, Defendant.

Dated at Tucson, June 14, 1916. **[75]**

And now, to wit, on June 14th, 1916, it is ordered that the appeal be allowed as prayed for.

WM. H SAWTELLE,

Judge.

[Endorsements]: In the U. S. District Court for the District of Arizona. In the Matter of Southern Arizona Smelting Company, a Corporation, Bankrupt. John H. Martin, Trustee of Imperial Copper Company, a Corporation, Bankrupt, Plaintiff, vs. M. P. Freeman, Trustee of Southern Arizona Smelting Company, a Corporation, Bankrupt, Defendant. Petition for Appeal. Filed June 14th, A. D. 1916. Mose Drachman, Clerk. **[76]**

In the United States District Court for the District of Arizona.

In the Matter of SOUTHERN ARIZONA SMELTING COMPANY, a Corporation, Bankrupt.

JOHN H. MARTIN, Trustee in Bankruptcy of IMPERIAL COPPER COMPANY, a Corporation, Bankrupt,

Plaintiff,

vs.

M. P. FREEMAN, Trustee in Bankruptcy of SOUTHERN ARIZONA SMELTING COMPANY, a Corporation, Bankrupt,

Defendant.

Order Extending Time to File Record and Docket Cause to August 14, 1916.

For good cause shown, the undersigned, the Judge who signed the citation in this appeal, does hereby order that the time to file the record in this case, and to docket this case with the clerk of the United States Circuit Court of Appeals for the Ninth Circuit, and the return date of citation, be and the same is hereby enlarged and extended until the 14th day of August, 1916.

Dated this 14th day of June, 1916.

WM. H. SAWTELLE,

Judge of the United States District Court for the District of Arizona.

[Endorsements]: In the U. S. District Court for the District of Arizona. In the Matter of Southern Arizona Smelting Co., a Corporation, Bankrupt.

John H. Martin, Trustee of Imperial Copper Company, a Corporation, Bankrupt, Plaintiff, vs. M. P. Freeman, Trustee of Southern Arizona Smelting Co., a Corporation, Bankrupt, Defendant. Order Enlarging Time to File Record and Docket Case. Filed June 14, 1916. Mose Drachman, Clerk. [77]

In the United States District Court for the District of Arizona.

IN EQUITY—No. E–47 (TUCSON).

In the Matter of SOUTHERN ARIZONA SMELTING COMPANY, a Corporation, Bankrupt.

JOHN H. MARTIN, Trustee of IMPERIAL COPPER COMPANY, a Corporation, Bankrupt,
Plaintiff,

vs.

M. P. FREEMAN, Trustee of SOUTHERN ARIZONA SMELTING COMPANY, a Corporation, Bankrupt,
Defendant.

Praecipe for Transcript of Record.

To the Clerk of the Above-entitled Court:

You will please prepare transcript of the record of this cause, to be filed in the office of the clerk of the United States Circuit Court of Appeals for the Ninth Circuit, under the appeal heretofore perfected, and include in said transcript the following pleadings, proceedings and papers on file, to wit:

1. Petition (Complaint of John H. Martin, Trustee).

2. Answer of M. P. Freeman, Trustee, defendant.
3. Stipulation of Parties, filed June 14, 1916.
4. Findings of Fact.
5. Conclusions of Law.
6. Judgment and Decree.
7. All minute entries made in said case on June 17, 1916, including the *nunc pro tunc* order; Order for Judgment, and Notice of Appeal and allowance thereof in open court.
8. Assignments of Error of M. P. Freeman, Trustee.
9. Petition for Appeal and Order Allowing Appeal.
10. Order Enlarging Time for Transmitting Record, filed June 14, 1916.
11. This Praecipe. [78]
12. Clerk's Certificate.

The said transcript to be filed with the clerk of the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, before August 14, 1916.

SELIM M. FRANKLIN,

Solicitor for M. P. Freeman, Trustee, Appellant.

Service of copy accepted this 14th day of June, 1916.

FRANCIS M. HARTMAN,

Attorney for John H. Martin, Trustee, Plaintiff.

[Endorsements]: In Equity No. E–27—Tucson. In the U. S. District Court for the District of Arizona. In the Matter of Southern Arizona Smelting Co., a Corporation, Bankrupt. John H. Martin, Trustee of Imperial Copper Company, a Corpora-

tion, Bankrupt, Plaintiff, vs. M. P. Freeman, Trustee of Southern Arizona Smelting Company, a Corporation, Bankrupt, Defendant. Praecipe. Filed June 14th, A. D. 1916. Mose Drachman, Clerk. [79]

In the United States District Court for the District of Arizona.

IN EQUITY—No. E–47 (TUCSON).

In the Matter of SOUTHERN ARIZONA SMELTING COMPANY, a Corporation, Bankrupt.

JOHN H. MARTIN, Trustee in Bankruptcy of IMPERIAL COPPER COMPANY, a Corporation, Bankrupt,

Plaintiff,

vs.

M. P. FREEMAN, Trustee in Bankruptcy of SOUTHERN ARIZONA SMELTING COMPANY, a Corporation, Bankrupt,

Defendant.

Certificate of Clerk U. S. District Court to Transcript of Record.

United States of America,
District of Arizona,—ss.

I, Mose Drachman, Clerk of United States District Court for the District of Arizona, do hereby certify that the foregoing pages numbers 1 to 79 inclusive, constitute and are a true, complete and correct copy of the record, pleadings and proceedings had in the case of M. P. Freeman, Trustee of Southern Arizona

Smelting Company, a Corporation, Bankrupt, Appellant, vs. John H. Martin, Trustee of The Imperial Copper Company, a Corporation, Bankrupt, Appellee, No. E–47 (Tucson), as called for in the praecipe filed herein, as the same appears on file and of record in said District Court.

I further certify that the cost of preparing and certifying said record amounts to the sum of $51.30 and that the same has been paid in full by the appellant, M. P. Freeman, Trustee of Southern Arizona Smelting Company, a corporation, bankrupt.

In testimony whereof I have hereunto set my hand and affixed the seal of the United States District Court for the District of Arizona at Tucson, in said District, this 30th day of June, [80] in the year of our Lord one thousand nine hundred and sixteen, and of the Independence of the United States of America the one hundred and fortieth.

[Seal] MOSE DRACHMAN,
Clerk United States District Court, District of Arizona.

By Effie D. Botts,
Deputy Clerk. [81]

[Endorsed]: No. 2824. United States Circuit Court of Appeals for the Ninth Circuit. In the Matter of Southern Arizona Smelting Company, a Corporation, Bankrupt. M. P. Freeman, as Trustee in Bankruptcy of Southern Arizona Smelting Company, a Corporation, Bankrupt, Appellant, vs. John

H. Martin, as Trustee in Bankruptcy of Imperial Copper Company, a Corporation, Bankrupt, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the District of Arizona.

Filed July 3, 1916.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

No. 2824

In the

United States Circuit Court of Appeals

for the Ninth Circuit

M. P. FREEMAN, Trustee in Bankruptcy of Southern Arizona Smelting Company, a corporation,

Appellant,

vs.

JOHN H. MARTIN, Trustee in Bankruptcy of Imperial Copper Company, a corporation,

Appellee.

BRIEF FOR M. P. FREEMAN, TRUSTEE, ETC., APPELLANT.

Filed
SEP 20 1916
F. D. Monckton,
Clerk.

SELIM M. FRANKLIN and
ELLINWOOD & ROSS,
Attornies for M. P. Freeman, Trustee, Etc., Appellant.

INDEX TO BRIEF OF APPELLANT

Page

Statement of the Case..... 1
Statement of the Facts..... 5
The Contract for Smelting Ores.....12
Method of Conducting Business Under the Contract.....16
Smelter Return.....17
How the Flue-Dust and Slag-Dump Were Created.....23
Specification of Errors Relied On.....27
Points of Law to Be Discussed.....28
Argument.....29
The Contract Constituted a Sale and Not a Bailment.....29
What is a Bailment.....31
Distinction Between Bailment and Sale.....32
Cases Illustrative of Difference Between Bailment and Sale.....33
Application of the Law to the Facts in This Case.....37
The Contracts as Construed by the Parties....40
The Monetary Transactions Between the Companies.....48
The Smelting Company Was Not a Subsidiary of the Copper Company.....50
The Statute of Limitations.....58

United States Circuit Court of Appeals

for the Ninth Circuit

M. P. FREEMAN, Trustee in Bankruptcy of Southern Arizona Smelting Company, a corporation, Appellant, vs. JOHN H. MARTIN, Trustee in Bankruptcy of Imperial Copper Company, a corporation, Appellee.	NO. 2824.

BRIEF FOR M. P. FREEMAN, TRUSTEE, ETC., APPELLANT.

SELIM M. FRANKLIN and
ELLINWOOD & ROSS,
Attornies for M. P. Freeman. Trustee, Etc., Appellant.

STATEMENT OF THE CASE.

This is an action brought by John H. Martin, as Trustee in Bankruptcy of Imperial Copper Company, a corporation, bankrupt, against M. P. Freeman, as Trustee in Bankruptcy of Southern Arizona Smelting Company, a corporation, bankrupt, to determine the ownership

and right of possession of some ten thousand tons of flue dust and many thousand tons of slag, being the residue or by-product of many thousands of tons of copper ore, shipped by the Imperial Copper Company in the years 1908, 1909 and 1910, to the Southern Arizona Smelting Company, and which ores were by the Smelting Company, in said years, smelted in its furnaces and reduced to copper bullion. The bullion was sold by the Smelting Company, and the ores from which the bullion was produced, have been paid for by the Smelting Company to the Imperial Copper Company.

The flue dust and slag is the refuse or residue which now remains at the works and on the ground of the Smelting Company; the ores having all been heretofore smelted, the copper bullion arising therefrom having been heretofore sold, and the Copper Company having been heretofore fully paid by the Smelting Company, the full value of all the ores so shipped and smelted.

John H. Martin, Trustee in Bankruptcy of said Imperial Copper Company, Bankrupt, claims this refuse or residue, this flue dust and slag, to be the property of the Imperial Copper Company, and brings this suit to recover the same.

M. P. Freeman, Trustee in Bankruptcy of Southern Arizona Smelting Company, Bankrupt, claims the same to be the property of the Smelting Company, because the Smelting Company purchased and paid for the ores

out of the smelting of which this residuum or by-product arose.

So the clear-cut question is presented: Who is the owner of the flue dust and slag? The Imperial Copper Company, who shipped the ore to the Smelting Company to be smelted, and who has already been paid the full value of the ores it so shipped; or the Smelting Company, who smelted the ores and paid the Copper Company therefor. The lower court held they belonged to the Imperial Copper Company. M. P. Freeman, Trustee, has appealed from that decree.

The suit was first brought by Martin, Trustee of Imperial Copper Company, by petition filed with the Referee in Bankruptcy, in the matter of Southern Arizona Smelting Company, a corporation, bankrupt, wherein he sought to have the Referee order said property delivered to him.

Voluminous evidence was taken before the Referee, from which the Referee found that the contract and transaction under which the Copper Company shipped the ores to the Smelting Company constituted a sale, and not a bailment; that the title to the ores passed to the Smelting Company; that the Smelting Company was the owner of the bullion, flue dust and slag into which the ores were converted; and that neither Martin, Trustee, nor the Imperial Copper Company, was the owner or entitled thereto.

Upon the hearing before the District Court, it was stipulated by the parties that the suit should be deemed

a plenary suit in equity, to be submitted upon the petition and answer theretofore filed with the Referee, and the evidence taken before him. (Record, p. 37). The parties further agreed in open court to the Findings of Fact in the case, and the court made, found and filed its Findings of Fact, in accordance with the facts so agreed to by the parties. (Record, p. 42).

Upon these "Findings of Fact," so made by the court and agreed to by the parties, the lower court found, as a conclusion of law, that the contract under which the ores were shipped by the Imperial Copper Company and smelted by the Smelting Company, constituted **a bailment** and not **a sale;** that the title to all the ores so shipped, "as well as the title to all of the flue dust and slag dump arising from the smelting of said ores by the Southern Arizona Smelting Company, remained in the Imperial Copper Company;" and that the trustee in bankruptcy of the Imperial Copper Company was therefore entitled to the same as part of the estate of said Copper Company, (Record, p. 92), and that the trustee of the Smelting Company was not entitled thereto.

And the court then rendered its judgment or decree, adjudging John H. Martin, as Trustee in Bankruptcy of the Imperial Copper Company, to be the owner and entitled to possession of said flue dust and slag dump. From this judgment and decree M. P. Freeman, as Trustee in Bankruptcy of Southern Arizona Smelting Company, has appealed to this court.

STATEMENT OF THE FACTS.

The facts in the case, as agreed to by the parties, are set forth in the "Findings of Fact" made and filed by the court. These undisputed facts are concisely as follows:

In May, 1903, the Imperial Copper Company, a corporation, hereinafter called the "Copper Company," was organized under the laws of Arizona, for the purpose of owning and operating mines, etc. (Findings of Fact 1, record p. 43).

In May, 1904, the Copper Company authorized the issuance and sale of $2,000,000 of first mortgage bonds, and secured the same by a trust deed executed by it to the Bankers Trust Company, as Trustee, upon all of the real and personal property it then owned, or might thereafter acquire; which trust deed was duly recorded June 24, 1904. (Finding 2, rec. p. 44).

Amongst the property so mortgaged and covered by said trust deed was a certain 640-acre tract of land, hereinafter referred to.

Thereafter, and on August 6, 1906, the Southern Arizona Smelting Company, a corporation, hereinafter called the "Smelting Company," was organized under the laws of Arizona, for the purpose of acquiring, selling and smelting of ores and metals, and the erection of plants, machinery, etc., in carrying on said business, and for other purposes. (Finding 3, rec. p. 44).

Thereafter, and on August 14, 1906, the Copper Company and the Smelting Company entered into an agreement in writing, wherein the Copper Company agreed, amongst other things, to erect upon the 640-acre tract of land, heretofore mentioned, a smelting plant, having a capacity of three hundred tons daily, and to sell and convey to the Smelting Company said 640-acre tract, with the smelter plant thereon, in consideration of the issuance by the Smelting Company to it of 7,995 shares of its, (said Smelting Company's) capital stock, of the par value of $100 each, a total par value of $799,500; and the Copper Company therein further agreed

> "to furnish the Smelting Company with all ores of every kind produced from the mines of the Copper Company (whether such mines are now owned or hereafter acquired by the Copper Company) that may be desired by the Smelting Company, to be smelted and reduced by the Smelting Company. The term of such contract to be a period of six months from and after the date of the beginning of operations of said smelter. The smelting, reduction and marketing of such ores so delivered by the Copper Company, to be done by the Smelting Company, at the actual cost thereof, plus 5% interest on the cost of the property and plant to the Smelting Company."

Finding 5, rec. p. 47.

Thereafter, and on April 13, 1908, the Copper Company and the Smelting Company entered into another agreement in writing, wherein the Copper Company agreed to erect another blast furnace with buildings,

ore-bins, etc., so as to double the capacity of the smelting plant, in consideration of the issuance to it, by the Smelting Company, of an additional 1000 shares of its capital stock. (Finding 8, rec. p. 63).

In pursuance of these contracts, the Copper Company did, in 1907, erect a smelting plant on the 640 acres, and did convey the said 640 acres, with the smelting plant thereon, to the Smelting Company, and did receive in payment therefor, 7,995 shares of the capital stock of the Smelting Company, par value of $100 each, a total par value of $799,500. (Finding 6, rec. p. 51). And the Copper Company did thereafter cause the additional plant and machinery to be installed, and did receive therefor an additional 1000 shares of the capital stock of the Smelting Company, of the par value of $899,500, which were so issued by the Smelting Company to the Copper Company, in payment for the 640-acre tract of land with the smelting plant and machinery thereon. (Finding 8, rec. p. 65).

As the 640-acre tract of land, upon which the Copper Company was to erect the smelting plant, had been mortgaged to the Bankers Trust Company, under the trust deed executed to secure the $2,000,000 of bonds heretofore mentioned, and as the Imperial Copper Company desired to have the lien of this mortgage or trust deed released as to said 640 acres, so that it could be transferred to the Smelting Company free of any lien, the Copper Company and the Bankers Trust Company, Trustee, with the consent of the holders of all the bonds,

agreed that the Bankers Trust Company should release the lien of its trust deed or mortgage as to said 640 acres, in consideration of the Copper Company substituting as security therefor, the said shares of stock of the Smelting Company, which the Copper Company was to or did receive under the agreements before mentioned. In pursuance of this last agreement, and on the 21st day of December, 1908, the Imperial Copper Company did assign and pledge to the Bankers Trust Company all of the said stock of the Smelting Company, and also certain other shares of stock, not necessary to be considered in this case, as additional security for the payment of the bonds before mentioned, and the Bankers Trust Company did release its lien as to said 640 acres. (Finding 28-29-30, rec. p. 81-85).

On July 3, 1911, the Bankers Trust Company brought suit before the District Court of the First Judicial District of the Territory of Arizona, against the Imperial Copper Company, wherein it sought to foreclose the said mortgage or trust deed, and its lien upon the shares of stock so pledged with it, default having been made in the payment of the interest on the $2,000,000 of bonds to secure which the deed of trust and pledge of stock had been made. (Finding 31, rec. p. 85).

A few days thereafter, to-wit, on July 5, 1911, certain creditors of the Copper Company filed with the said District Court their petition to have the Copper Company declared a bankrupt, and thereafter, and on the 25th day of July, 1911, the Copper Company was ad-

judicated a bankrupt, and M. P. Freeman was elected its trustee in bankruptcy. (Finding 17, rec. p. 74).

On June 17, 1914, Freeman resigned as Trustee in Bankruptcy of the Copper Company and John H. Martin, the appellee in the present case, was appointed trustee in bankruptcy to fill the vacancy. (Finding 19, rec. p. 75).

On July 9, 1914, said Martin, as Trustee in Bankruptcy of the Copper Company, did file in the said foreclosure suit, (the suit having been transferred to the Superior Court of the State of Arizona, the successor of the Territorial District Court) his petition to intervene and make defense to the action, which petition was granted by the State Court; and Martin, as Trustee, did file his answer to the complaint of the Bankers Trust Company against the Copper Company, wherein, amongst other things, he did deny the validity of the lien or pledge upon shares of the capital stock of the Smelting Company, and did deny the validity of the assignment and transfer of said shares to the Bankers Trust Company, as security, as aforesaid. (Finding 32, rec. p. 85).

Thereafter, this foreclosure suit was heard and tried in the State Court, and on December 28, 1914, the State Court did render its decree wherein, amongst other things, it did adjudge that the said shares of the capital stock of the Smelting Company were duly pledged by the Copper Company, as additional security for said bonds, and did foreclose the lien thereon, and did

direct said stock to be sold by its Special Master, and the proceeds of sale to be applied to the payment of said bonds. (Finding 33, rec. p. 86). And in that case the State Court did make certain Findings of Fact to the foregoing effect, which findings the United States District Court, in its Findings of Facts in the present case, held to be binding and conclusive upon Martin, as Trustee, in the present action. (Finding 35, rec. p. 87).

Thereafter, and in pursuance of the decree of the State Court foreclosing the pledge or lien upon the said shares of stock, the same were, to-wit, on the 19th day of April, 1915, sold by the Special Master of the State Court to one Leo Goldschmidt, which sale was duly confirmed by the State Court. So that when Martin, Trustee, brought the present suit, neither the Copper Company, nor the Bankers Trust Company, nor John H. Martin, as Trustee in Bankruptcy of the Copper Company, did have, or now have, any right, title or interest of any kind whatsoever, in and to the shares of the capital stock of said Smelting Company, so pledged and foreclosed as aforesaid. (Finding 36, rec. p. 90).

We may briefly summarize then, the transaction in regard to the shares of stock of the Smelting Company as follows: The Smelting Company issued to the Copper Company about 9,000 shares of its capital stock, of the par value of about $900,000, in payment for the 640 acres of land with the smelting plant thereon. The Copper Company pledged these 9,000 shares of stock with the Bankers Trust Company, as additional security

for its $2,000,000 of bonds, and also in consideration of the Bankers Trust Company, as Trustee, releasing the lien it had on the 640-acre tract of land. The shares were so pledged with the Bankers Trust Company, Trustee, in December, 1908; default was made in the payment of interest on the bonds, and the pledge or lien on the stock was foreclosed by a suit in the State Court, in which suit Martin, Trustee in Bankruptcy of the Imperial Copper Company, was a party. Under the decree of foreclosure in that suit the said shares were sold to a third person, to-wit, Leo Goldschmidt, which sale was confirmed by the State Court, and neither the Imperial Copper Company, nor Martin, as its Trustee in Bankruptcy, has any interest of any nature whatsoever, in any of the shares of stock of the Smelting Company; on the contrary, they are the property of the third person, to-wit, of Leo Goldschmidt. And thus ended all title or interest of the Copper Company, or its Trustee in Bankruptcy, in and to said shares of stock.

THE CONTRACT OF SMELTING ORES.

As heretofore stated, in the contract of August 14, 1906, between the Copper Company and the Smelting Company, the Copper Company agreed to furnish the Smelting Company with all ores of every kind produced from its mines, that might be desired by the Smelting Company, the term of such contract to be a period of six months from and after the date of the beginning of the operations of the smelter. And the Smelting Company agreed to smelt, reduce, and market such ores, so delivered, at the actual cost, plus 5% interest on the cost of the property and plant of the Smelting Company, that is, 5% on $900,000, or $45,000 per annum. (Finding 5, rec. p. 47).

The smelting plant was completed and commenced operations about January 1, 1908, and continued operations until August 15, 1910, when the same was closed down; and it has not operated since. (Finding 9, rec. p. 66).

Before commencing operations, and before any ores were shipped by the Copper Company to the Smelting Company, to-wit, on December 16, 1907, the Smelting Company, as party of the first part, entered into an agreement with the American Metals Company, Ltd., as party of the second part, and the Copper Company, as party of the third part, which agreement is in writing, and is set forth in Finding 7, rec. p. 51.

In this agreement it was, amongst other things, agreed by all three of the parties, as follows:

"I. The party of the first part (Smelting Company) agrees to sell, and hereby does sell at the price and upon the terms hereinafter set forth, to the party of the second part (American Metals Company, Ltd.) the entire output of copper now or at any time during the existence of this agreement smelted, owned, or controlled by it, which it guarantees shall not be less than 1,250,000 lbs. to 1,500,000 lbs. monthly, subject to conditions hereinafter set forth, for a period of three years beginning with the first shipment expected to be made in January, 1908, and terminating three years thereafter.....

II. The copper shall be delivered by the party of the first part (Smelting Company) to the party of the second part (American Metals Company, Ltd.) at New York, lighterage free, or at the option of the producers at Nichols Siding, Long Island Railroad, provided no additional expense be occasioned the party of the second part.

Said deliveries to be made in the form of blister copper in plates, measuring.....And assaying about 98½% or over in copper.....

III. The party of the second part agrees at the request of the party of the first part, to advance and pay the freight charges upon the said deliveries of copper when the same shall become due in New York, and upon receipt of consignment to use due diligence in causing the same to be weighed, sampled and assayed, as hereinafter provided; and to account to the party of the first part (Smelting Company) at is office in New York, on the due dates as hereinafter defined, for the copper, gold and silver contents of said consignments, less all

advances, if any, with interest thereon; also less refining charges as hereinafter specified;..... The party of the first part shall give the party of the second part prompt written notice of each shipment.

The party of the first part shall have the privilege of drawing at sight upon the party of the second part for 90% of the approximate value of such blister copper, less freight and interest and refining charges, as above set forth, as shown by the bill of lading, satisfactory assay certificates.....

Whenever an advance has been made by the party of the second part upon any consignment of copper by means of a draft drawn by the party of the first part, as above provided, and any of such copper be lost, or for any cause whatever not delivered to the party of the second part, within a reasonable time, in no event to exceed sixty days after such advance, the party of the first part shall promptly repay the party of the second part the amount of such draft, with interest.

IV. It is mutually agreed that each delivery of blister copper shall be weighed and sampled upon arrival at the refining works by the party of the first and second parts hereto, and by methods mutually agreed upon by them, each such party paying its own representative.

V. The party of the second part (American Metals Company, Ltd.) agrees to purchase and hereby does purchase the said material from the party of the first part (Smelting Company) upon the terms herein set forth, and agrees to pay the party of the first part (Smelting Company) for the same in the following manner:

For all gold at the rate of $20 per ounce.....

For the silver contents of said material.....

For the copper contained in said material on the basis of electrolytic assay, at the average price of electrolytic copper in cakes, wire bars or ingots, as quoted daily in the Engineering and Mining Journal of New York for the week during which the material is sampled at the refiners.....

The party of the second part (American Metals Company, Ltd.) shall deduct and be entitled to retain from the moneys that may be payable to the party of the first part (Smelting Company) pursuant to the terms of this contract for the cost of refining such material $15 for 2000 lbs. of copper find.

VI. And the party of the third part (Imperial Copper Co.) hereto, representing that it owns practically all of the stock of the said party of the first part hereto, and owns or controls some of the mines from which the party of the first part is to acquire ore covered by this agreement, and as a further inducement for the party of the second part to enter into this agreement, the party of the third part hereto guarantees to the party of the second part the prompt and faithful performance by the said party of the first part hereto of all the terms and provisions of this agreement on the part of the party of the first part to be done or performed, and the party of the third part hereby waives notice of each and every default under this agreement on the part of the party of the first part."

Finding 7, rec. p. 51.

The gist of the foregoing contract is that the Smelting Company shall sell to the American Metals Company, all bullion produced by it, and the American Metals Company shall buy all of the bullion so produced, and pay the Smelting Company therefor. And this agree-

ment, that the Smelting Company shall sell the bullion and shall receive the money paid therefor, is ratified and agreed to by the Copper Company.

METHOD OF CONDUCTING BUSINESS UNDER THE CONTRACTS.

From the time the Smelting Company commenced operating the smelter in 1908, down to the time it ceased operating, in 1910, the Copper Company shipped to it over 500,000 tons of ore, and the same was smelted and reduced to bullion by the Smelting Company, under the terms of the contract heretofore mentioned, and the bullion so produced was sold by the Smelting Company to the American Metals Company, in accordance with the contract heretofore referred to. (Finding 10, rec. p. 66).

The manner in which the business between the Companies was conducted was as follows:

The Copper Company made shipments of ore to the Smelting Company in carload lots. Each carload was designated by a lot number; assay was made thereof by the Smelting Company and a smelter return upon each lot so sampled and assayed was made and delivered by the Smelting Company to the Copper Company. Each smelter return was in the following form:

SOUTHERN ARIZONA SMELTING COMPANY

Sasco, Arizona, (Date.)

Bought of Imperial Copper Co.,
Silverbell, Arizona.

NEW YORK QUOTATIONS:
Avg. E. & M. Journal
Date 7-28 to 8-13 incl.
Copper 12-417 cts. per lb.

Class UNION ORE
Smelter Lot No. See Under
Shipper's Lot No, "Car No."
DATE SAMPLED Aug. 1-13th incl.

CAR Init. Sm.	Nos. Mine	Wet 3,094,880	Moist 5.1	Weight Dry 2,936,928
3926	3697			
3930	3701			
3934	3705			
3938	3709			
3943	3713			
3947	3717			
3965	3736			
3969	3739			

Payments:	VALUES Per Ton	Total
Silver N. P.		
Copper 2.32% 46.4 lbs. @ 9.917	4.60	4.60
Deductions:		
Treatment	2.20	2.20
Price per ton	2.40	

Gross proceeds 1,468,464 tons @ 2.40 ..... 3524.31
Less freight from Silver Bell; Prepaid
Balance Due 3524.31

Correct: D. G. H. Invoice Clerk
Checked: D. G. H.
Approved: Meade Goodloe, Superintendent

The net value or balance due, according to each smelter return, was credited by the Smelting Company on its books, as so much money due to the Copper Company. Likewise the Copper Company also entered on its books this net value or balance due, as the amount due to it from the Smelting Company, for the particular lot of ore so shipped and accounted for. (Finding 11, rec. p. 67).

The bullion which resulted from the smelting of the ores so shipped, as well as the bullion arising from smelting of ores for the public generally, were by the Smelting Company shipped and sold to the American Metals Company, under the contract heretofore mentioned. The American Metals Company, on its part, rendered an account sales to the Smelting Company, for each lot of bullion so shipped, which showed that it had received and sold for account of the Smelting Company the amount of the bullion as per the lot number, the assay value, charge for refining, etc., leaving a net balance due to the Smelting Company, as per form set forth in Finding of Fact, 11, rec. p. 70.

As the Smelting Company made each shipment of bullion to the American Metals Company it obtained a bill of lading therefor from the Railroad Company, which bill of lading the Smelting Company delivered to the Imperial Copper Company; and the Imperial Copper Company collected the amount from the American Metals Company and credited the same to the account of the Smelting Company; and the Smelting Company on its part, charged the Copper Company with the amount of money which the Copper Company so received. (Finding 12, rec. p. 71).

In other words, the Smelting Company bought the ores from the Copper Company on the basis of the assay value of the ore, less smelter charge, and became the debtor of the Copper Company for the balance so ascertained. All the bullion which the Smelting Company

produced from the ores shipped to it by the Copper Company, as well as from the ores shipped to it by others, it sold to the American Metals Company, and it directed the American Metals Company to pay the amount thereof to the Copper Company, which was done, and the Copper Company credited the Smelting Company as having received from it that much money. (Findings 12, 13, 14, and 15, rec. p. 71, 72 and 73).

The method by which the Smelting Company paid its bills, including labor, material, coke, fuel and all other charges which it had to pay in the conduct of its business, was by drawing an order for the amount on the Imperial Copper Company, in favor of the person to be paid, with request that the Copper Company pay the same, and charge the amount to the account of the Smelting Company. The Copper Company paid the order and charged the same as so much money paid to the Smelting Company, as any bank would have done upon a check. Entry of the transaction was made in the books of each of the Companies. The Copper Company did not pay any moneys for the Smelting Company which it did not charge against the Smelting Company; the accounts between the two Companies were balanced monthly. (Finding 13, rec. p. 72).

In addition to smelting the ores for the Copper Company, the Smelting Company smelted ores for other persons and corporations, and it also shipped and sold the bullion produced from these other ores, in the manner above stated. The Smelting Company paid for the

ores which it so purchased, by orders on the Copper Company, which orders the Copper Company paid, and the amount of which payments the Copper Company charged against the account of the Smelting Company. (Finding 14, rec. p. 72).

In conducting its smelting operations the Smelting Company produced large amounts of flux and coke. Its purchase of coke alone from January, 1908, to September, 1910, being of the value of over $500,000. The manner in which the Smelting Company paid for this coke was by an order drawn on the Imperial Copper Company, which the Imperial Copper Company paid, and the amount of which payment the Copper Company charged against the Smelting Company. And the Smelting Company also kept account thereof itself. (Finding 15, rec. p. 73).

In other words, all of the moneys received by the Smelting Company from the sale of bullion produced by it, it turned over or deposited with the Copper Company, for which deposit it received a general credit. Out of these moneys the Copper Company paid, upon the order of the Smelting Company, the amounts due to the Copper Company for the ores shipped by it to the Smelting Company, as ascertained and settled by each smelter return; and also paid all orders for labor, material, coke, etc., which the Smelting Company drew upon it, and requested it to pay, and charged such payments against the account of the Smelting Company. Each month a balance was struck between the two com-

panies, showing how the account between them stood.

In August, 1910, the Smelting Company closed down its plant and ceased to operate the same; but it continued to present orders for labor, material and other items of like nature, to the Copper Company, requesting it to pay the same, and the Copper Company did pay the same, up to July, 1911, when the Copper Company went into bankruptcy. On that date the books of the Copper Company showed that the Copper Company had paid out a total of $26,887.71, in excess of all the moneys which it had received and credited to the account of the Smelting Company, so that on that day, according to its books, a balance was due the Copper Company from the Smelting Company of $26,887.71. (Finding 16, rec. p. 73).

In other words, after the Copper Company had been fully paid the value of all of the ores which it shipped to the Smelting Company, and had been repaid all of the amounts it had advanced or paid on the orders of the Smelting Company, there remained a balance due it of $26,887.71. And this amount the Copper Company treated as a debt due from the Smelting Company to it.

After the Copper Company had been adjudicated a bankrupt, its trustee in bankruptcy, considering this balance as a debt due from the Smelting Company to the Copper Company, brought suit in the State Court against the Smelting Company for the recovery of this amount. (Finding 17, rec. p. 74).

And thereafter the said trustee in bankruptcy of the

Imperial Copper Company did, upon application of certain creditors of the Copper Company, Bankrupt, cause a writ of attachment to issue in the said suit, and did cause the same to be levied upon all the real property of the Smelting Company; which suit is still pending. (Finding 18, rec. p. 75).

The Copper Company, therefore, has been fully paid for the ores which it shipped to the Smelting Company, and has been fully repaid for all moneys which it paid out for the Smelting Company except the balance of $26,887.71, and for this balance Martin, as trustee in bankruptcy of the Copper Company, has brought suit in the State Court, which suit is still pending.

On September 29, 1914, being more than three years after the Copper Company had been adjudicated a bankrupt, the Smelting Company itself filed with the U. S. District Court for Arizona, its voluntary petition in bankruptcy, and on said 29th day of September, 1914, the Smelting Company was adjudicated a bankrupt; and thereafter, and on October 31, 1914, M. P. Freeman was appointed and qualified as its Trustee in Bankruptcy. (Finding 25, rec. p. 79).

Thereafter and on August 25, 1915, John H. Martin, as Trustee in Bankruptcy of the Copper Company, did file with the Referee of said District Court, in the matter of the bankruptcy of said Smelting Company, the said claim of the Imperial Copper Company, for the before mentioned balance of account of $26,887.71, for which

his suit was pending, as aforesaid, claiming that this amount was due from the Smelting Company to the Copper Company. (Finding 26, rec. p. 80).

So that not only did the Imperial Copper Company itself consider this balance as a debt due from the Smelting Company to it; but John H. Martin, its Trustee in Bankruptcy, the appellee herein, has also considered this balance as a debt due from the Smelting Company to the Copper Company; being the balance unpaid for all ores shipped and all moneys advanced by the Copper Company to or for the Smelting Company.

HOW THE FLUE DUST AND SLAG DUMP WAS CREATED.

The flue dust and slag dump, which is the subject matter of the present suit, arose in the following manner: The ores received by the Smelting Company were placed in its smelter, together with coke and flux; the coke was ignited, a blast of air was turned on to the mass; the fine particles of ore and coke were blown into a stack which ended in a chamber in which the dust was collected continuously during smelting operations. This dust constitutes the flue dust in controversy, and the amount thereof is about 10,000 tons. (Finding 20, rec. p. 76).

The ores, in the process of smelting, were converted into bullion containing copper, into the flue dust just mentioned, and into a residue which is called slag. The

bullion produced has all heretofore been shipped and sold by the Smelting Company, as heretofore stated. There now remains only the flue dust and the slag. The slag constitutes the slag dump in controversy in this case, aggregating many thousand tons, which is of very little, if any, value. (Finding 20, rec. p. 76).

The Copper Company, as before stated, was adjudicated a bankrupt, in July, 1911. M. P. Freeman was its first trustee in bankruptcy. He resigned in July, 1914, and John H. Martin was appointed to fill the vacancy. While M. P. Freeman was still Trustee in Bankruptcy of the Copper Company, certain creditors of said bankrupt Copper Company requested him, as Trustee, to take possession of the property and assets of the Smelting Company, on the theory that those assets belonged to the Copper Company; which request he as trustee, on the advice of his attorney, refused, for the reason that said property was not the property of the Copper Company. (Finding 22, rec. p. 77).

Upon the Smelting Company shutting down its plant in August, 1910, George W. Dietz, acting manager of the Smelting Company, took possession of all of its property, including the flue dust and slag dump, and remained in continuous possession of all of the property of the Smelting Company, including the flue dust and slag, continuously for a period of more than four years, to-wit, until he delivered the same to the trustee in bankruptcy of said Smelting Company, in October, 1914; and during all of said times the Smelting Com-

pany has had possession and claimed ownership of said flue dust and slag. (Finding 21, rec. p. 77).

It was not until John H. Martin was appointed trustee in bankruptcy of the Copper Company, to-wit, on or about July 5, 1914, that any effort was made by the Copper Company, or its trustee in bankruptcy, to take possession of said flue dust and slag. But in July, 1914, John H. Martin, as such Trustee, did attempt to take possession thereof, by posting notice to that effect, and by leaving a keeper on the ground, although the Smelting Company, at the time, had its own keeper on the ground. (Finding 23, rec. p. 79).

The following creditors of the Smelting Company have filed their claims with the Referee in Bankrutcy, in the matter of Southern Arizona Smelting Company, Bankrupt, which claims have been duly allowed by the Referee, to-wit:

Name of Creditor.	**Amount of Claim.**	
Consolidated National Bank..	$20,000.00	and interest
Aubrey & Semple	1,894.12	and interest
Colorado Fuel & Iron Co.....	27,759.71	and interest
F. M. Murphy.....	4,897.59	
B. P. Cheney.....	3,073.81	
Poland Mining Company....	311.05	
F. M. Murphy and B. P. Cheney	1,500.00	and interest
Louis St. Louis.....	400.00	
George W. Dietz	400.00	
	$60,236.28	

Finding 27, rec. p. 80.

So that in September, 1914, when the Smelting Company was adjudicated a bankrupt, it owed debts of the aggregate amount of over $60,000, plus interest, in addition to the debt claimed as due from it to the Copper Company, and its various creditors have filed their claims in the bankruptcy proceedings of the Smelting Company, which claims have been duly allowed.

CONCLUSION OF LAW.

From the foregoing facts, the lower court made its conclusion of law to the effect that Martin, as Trustee of the Imperial Copper Company, was the owner and entitled to the possession of the flue dust and slag, and from that judgment or decree Freeman, Trustee, has appealed to this court. (Rec. pp. 91-93).

So the only question presented upon the appeal of this case is whether or not, under the undisputed facts as found by the court, the decree of the lower court, in adjudging John H. Martin, Trustee of the Copper Company, to be the owner and entitled to the possession of said flue dust, and slag, is right or wrong.

SPECIFICATION OF ERRORS RELIED UPON.

The decree of the court is erroneous in this:

1. That therein John H. Martin, as Trustee in Bankruptcy of the Imperial Copper Company, is adjudged to be the owner and entitled to possession of the flue dust and slag dump in controversy in this action, whereas, the court should have adjudged and decreed that M. P. Freeman, as Trustee in Bankruptcy of the Southern Arizona Smelting Company, was the owner and entitled to the possession thereof.

2. That under the Findings of Fact, as made by the court, it clearly appears that the contracts under which the Imperial Copper Company shipped its ores to the Smelting Company to be smelted, did not contemplate a return of these ores to the shipper, either in their original form, or in their altered form, as bullion, flue dust and slag; but did contemplate a payment by the Smelting Company for the value of the ores; that it further appears from said Findings, that all of the ores were smelted and converted into bullion, and that the Imperial Copper Company has already received the full value of the ores it so shipped, except a small balance, which it claims as a debt; and therefore, it is not entitled to a return either of the ores in their original form, or in their altered form as bullion, flue dust or slag. And the conclusion of law made by the lower court, to the effect that the contract under which the ores were shipped

was a contract of bailment and not of sale is erroneous, and the decree predicated on such erroneous conclusion of law is likewise erroneous.

3. That from said facts the court should have found as a conclusion of law, that the contract between the parties was one of sale, wherein the title to the ores passed upon delivery to the Smelting Company, and the court should have decreed that M. P. Freeman, as trustee in bankruptcy of the Smelting Company, was the owner of said flue dust and slag.

POINTS OF LAW TO BE DISCUSSED.

1. The contract under which the ores were shipped by the Copper Company to the Smelting Company constituted a contract of sale, wherein the title to the ores shipped passed to the Smelting Company upon delivery, and did not constitute a bailment, in which the title to the ores, in either their original or altered form, remained in the Copper Company.

2. As the Copper Company had pledged as security for its bonded indebtedness, all of the shares of the capital stock of the Smelting Company owned by it, and as that pledge has been foreclosed and the shares under such foreclosure had been sold to a third person, to-wit, Leo Goldschmidt, who is now the owner thereof; neither the Copper Company, nor its Trustee in Bankruptcy, is the owner of those shares of stock, nor of the assets of said Smelting Company which these shares rep-

resent; but said assets belong to the stockholders of said Smelting Company, to-wit, Leo Goldschmidt, and his assigns, subject only to the payment of the debts due by the Smelting Company.

3. As the Smelting Company was in possession of the flue dust and slag, claiming the same adversely to the Copper Company and its Trustee in Bankruptcy, for more than three years before the present suit was brought, the right of action of the trustee in bankruptcy of the Copper Company to recover said property, is barred by the Statute of Limitations of Arizona, to-wit, by the provisions of Sections 710, 711, 713, and 716, of the Revised Statutes of the State of Arizona of the year 1913.

ARGUMENT.

Point One.

The Contract Under Which the Copper Company Shipped Its Ores to the Smelting Company, Constituted a Sale, and Not a Bailment.

As the findings of Fact made by the lower court in this case are admitted to be correct by both parties to the action, there is only one question presented upon this appeal; a question of law, namely: Whether or not, under the admitted facts as found by the court, the title to the ores shipped by the Copper Company and smelted by the Smelting Company, remained in the Copper Company; or whether the title thereto passed to the Smelting Company.

In other words, whether or not the contract between the two Companies was a contract of bailment, or was a contract of sale. If a contract of bailment, then the decree of the lower court is right; for in a bailment the title to the property delivered always remains in the bailor, both in its original and in its altered form. If it was a sale, then the decree of the lower court is wrong; for in a sale the title passes, and the shipper has only a debt for the value of the property delivered.

M. P. Freeman, appellant, claims that the contract between the two companies under which the ores were shipped and smelted, constituted a contract of sale; that the title to the ores passed to the Smelting Company upon delivery, and that the Smelting Company became the debtor of the Company for the value of the ores so delivered.

He further claims that the Smelting Company has already paid to the Copper Company the full value of these ores, and if it owes anything to the Copper Company, it is only for a comparatively small balance on the general account between the two Companies.

The lower court held the contract between the two Companies to constitute a bailment, and not a sale.

We will show that the lower court was wrong; that the contract constituted a sale, and not a bailment; and therefore, the judgment and decree of the lower court should be reversed.

WHAT IS A BAILMENT?

"A bailment may be defined as a delivery of personalty for some particular purpose, or on mere deposit, upon a contract, express or implied, that after the purpose has been fulfilled it shall be redelivered to the person who delivered it, or otherwise dealt with according to his directions, or kept until he reclaims it, as the case may be."

6. Corpus Juris, p. 1084.

"Bailment is the delivery of goods for some purpose, upon a contract, express or implied, that after the purpose has been fulfilled they shall be redelivered to the bailor or otherwise dealt with, according to his directions, or kept until he reclaims them."

Am. & Eng. Ency. of Law, Vol. 3, p. 733.

"It is of the very essence of a contract of bailment that it shall contemplate the return of the property bailed, either in the same or in its altered form."

6 Corpus Juris, p. 1086.

"If the identical thing, either in its original or in its altered form, is to be returned, it is a bailment."

Union Stock Yards Co. vs. Western L. & C. Co.,
7 C. C. A. 660; 140 Fed. 49;
Powder Co. vs. Burkhart, 97 U. S. 116;
Sturm vs. Boker, 150 U. S. 312.

DISTINCTION BETWEEN BAILMENT AND SALE.

"The fundamental distinction between the two (bailment and sale) is that in a bailment the identical thing delivered, in the same or an altered form, is to be restored, **and the title to the property is not changed;** while in a sale there is no obligation to return the specific article, but the party receiving it is at liberty to return another thing of equal value, either in the form of money or otherwise, and becomes a debtor to make the return **and the title to the property is changed."**

Am. & Eng. Ency. of Law, Vol. 3, p. 735.

"The fundamental distinction between a sale and a bailment lies whether an obligation exists to restore the thing delivered in the same, or in an altered form, and in whether the title passes.

The transaction is a bailment if the identical thing is to be returned although in altered form.

If the receiver is not bound to return the identical things, but is at liberty to return something else, as a rule the property passes, and the transaction is in effect a sale or exchange."

Corpus Juris, Vol. 6, p. 1086, 1087.

35 Cyc. 28-29.

"The distinction between bailment and sale is not difficult of ascertainment, if due regard be had to the elements, peculiar to each. In bailment the identical thing is to be restored. In a sale there is an agreement, express or implied, to pay money or its equivalent for the thing delivered, and there is no obligation to return."

In re Galt, 56 C. C. A. 470; 120 Fed. 64-69.

In the case of Laflin & Rand Powder Company v. Burkhardt, 97 U. S. 110, 24 L. ed. 973, the court held, we quote from the syllabus:

> "Where articles are delivered to be manufactured, if the product of the identical articles delivered is to be returned to the original owner in a new form, it is a bailment, **and the title does not vest in the manufacturer.**
>
> BUT, if the manufacturer is not bound to return the same articles delivered, but may deliver any other of equal value, it is a sale or a loan **and the title to the thing delivered vests in the manufacturer."**

CASES ILLUSTRATIVE OF THE DIFFERENCE BETWEEN BAILMENT AND SALE.

In the case of Laflin and Rand Powder Co. vs. Burkhardt, 97 U. S. 110-120, 24 L. ed. 973-977, supra, Ditmar and the Powder Company entered into a contract, under which the Company delivered to Ditmar certain materials which he was to manufacture into an expensive explosive compound, and when manufactured, were to be by him sent to the Company to be by it sold for their joint account. After the material had been delivered to Ditmar, one Burkhardt sued Ditmar for a debt, recovered judgment, caused execution to issue, and under the execution levied upon and sold the material so delivered to Ditmar, claiming the same to be

the property of Ditmar. The Powder Company claimed title to the property and brought suit to recover the same on the theory that the contract under which it delivered the material to Ditmar created a bailment and not a sale. The court held that the delivery of the material to Ditmar did not create a bailment; but did create a sale, and that the title vested in Ditmar upon delivery and was subject to his debt. In rendering its decision in that case, the court said:

> "Thus where logs are delivered at a sawmill to be manufactured into boards, or leather to a shoemaker to be made into shoes, rags into paper, olives into olive oil, grapes into wine, wheat into flour, if the product of the identical articles delivered are to be returned to the original owner in a new form, it is said to be a bailment, and the title never vests in the manufacturer. If, on the other hand, the manufacturer is not bound to return the same wheat or flour or paper, but may deliver any other of equal value, it is said to be a sale or a loan, and the title to the thing delivered vests in the manufacturer. We understand this to be a correct exposition of the law. See Pierce vs. Schenck, 3 Hill, 28; Norton vs. Woodruff, 2 N. Y. 152; Mallory vs. Willis, 4 N. Y., 76; Foster vs. Pettibone, 7 N. Y. 433."
>
> Laflin and Rand Powder Co. vs. Burkhardt, 97 U. S. 110; 24 L. ed. 973-977.

In the case of Austin vs. Seligman, 18 Fed. Rep. 519-523, the plaintiff alleged in his complaint that he delivered to Kempt & Co. certain jeweler's sweepings of the value of $4,292, to be refined by them, and that he agreed to pay that firm for the refining thereof the sum of

$320; that by the terms of the agreement between them the product of the refining was either to be delivered to them, or the value thereof accounted for, less the agreed price for refining. The question was whether or not this contract was one of bailment or of sale. The court held it was a sale. In its decision the court said:

> "But the rule is well settled that when, by the terms of the contract under which property is delivered by an owner to another, the latter is under no obligation to return the specific property either in its identical form or in some other form in which its identity may be traced, but is authorized to substitute something else in its place, either money or some other equivalent, the transaction is not a bailment, but is a sale or exchange. Here the agreement was that Kempt & Co. should return the refined product of the sweepings or account for the value thereof, less the price for refining. They had an option which was inconsistent with the character of a bailment. Hurd vs. West, 7 Cow. 752; Smith Merry, 3 Mason, 478; Chase vs. Washburn, 1 Ohio St. 244; Ewing vs. French, 1 Blackf. 353; Schouler, Bailm, 5. The case is not one where they had possession of the plaintiff's property under an executory agreement to purchase, but one where the title passed on delivery, unless the delivery was a bailment. It was not a bailment if they had a right to return money in its place."

Austin vs. Seligman, 18 Fed. Rep. 519-523.

In the case of Smith vs. Clark, 21 Wend. 84, 34 Am. Dec. 213, it was held:

> "Where a miller agreed with other persons to deliver to them for every four hundred and fifty five pounds of wheat received, one barrel of super-

fine flour, and there was no stipulation or understanding that the wheat should be returned in the form of flour, the transaction constituted a sale, and not a bailment, and the title to the wheat passed upon the delivery thereof."

"Farmers delivering milk to a cheese factory were each credited with the amount of their milk which was mixed together and made into cheese which the Company sold. After deducting a commission, the balance of the proceeds of the sales was divided between the farmers according to the amount of milk delivered. Held, that there was no bailment as to the particular milk delivered, but that the transaction was a sale."

Butterfiield vs. Lathrop, 71 Pa. (21 P. F. Smith) 225.

In the case of Scott Mining & Smelting Company vs. Shultz & Clary, 67 Kan. 605; 73 Pac. 903, the court held:

"Mining property, consisting of real estate and personal property, was leased by the owner to another for a term of years at a stipulated royalty, and it was agreed in the lease that at its expiration the personal property, which included some that would be consumed by use, should be returned by the lessee in kind or value, according to an invoice which had been made, at the option of the lessor. **Held,** that the transaction was in the nature of a sale of the personal property, and the title thereto passed to the lessee."

We also refer to the case of Chisholm vs. Eagle Ore Sampling Company, 75 C. C. A. 472, 144 Fed. 670-673, which construed a contract relative to ores ship-

ped to a smelter to be smelted, and wherein the facts are very similar to the facts in the case at bar. The contract was held to constitute a sale and not a bailment. We think this case is decisive of the present case.

APPLICATION OF THE LAW TO THE FACTS OF THIS CASE.

Under the contract between the Copper Company and the Smelting Company, of date August 14, 1906, set forth in full in Finding 5, rec. p. 47-51 the Copper Company agreed to furnish the Smelting Company with all the ores it produced that might be desired by the Smelting Company, "the smelting, reduction and marketing of such ores so delivered by the Copper Company to be done by the Smelting Company, at the actual cost thereof, plus 5% interest on the cost of the property and plant of the Smelting Company."

After the execution of this agreement, and before any ores were shipped or smelted, the two Companies entered into an agreement with American Metals Company, of date December 16, 1907, which agreement is set forth in full in Finding 7, rec. p. 51-63 wherein, amongst other things, it was agreed that all of the bullion produced by the Smelting Company, in the course of its smelting operations, should be by the Smelting Company sold to the American Metals Company, and that the American Metals Company should pay the Smelting Company therefor.

The Copper Company was party to this agreement, and therein it did specifically agree that the bullion, which was the altered form into which all the ores received and smelted by the Smelting Company, and the moneys received therefor should be paid to the Smelting Company. (Finding 7, rec. p. 51-63).

This agreement specifically negatives any idea on the part of the Copper Company or the Smelting Company that the bullion, which was the altered form into which the ores were to be changed, should be returned to the Copper Company. On the contrary, the Copper Company specifically agreed that said bullion should **not** be returned to it, but should be sold by the Smelting Company, and that the proceeds of such sale should be paid **to the Smelting Company.**

The contracts therefore, by which the Copper Company was to ship its ore to the Smelting Company absolutely preclude any idea of bailment; for in no event was the Smelting Company to return or redeliver to the Copper Company the ores, either in their original form as ores, or in their altered form as bullion.

In bailment the title to the property in its original or in its altered form remains in the bailor. But to constitute a bailment, as all the authorities hold, there must be an agreement or an obligation that the identical property delivered be returned, either in its original or in its altered form.

In the present case the ore was delivered for the

specific purpose of changing its form into bullion. A return of the ore itself was not contemplated.

Nor was the ore in its altered form of bullion to be returned or redelivered to the Copper Company; for the Copper Company specifically agreed that the bullion should be sold by the Smelting Company to the American Metals Company and that the American Metals Company should pay the Smelting Company therefor. A return, therefore, of the ore in the altered form of bullion, was not contemplated, or agreed to by the parties.

The Copper Company, in that written agreement, went further and guaranteed that the Smelting Company not only would and should sell to the American Metals Company all the bullion produced from ores delivered by the Copper Company to the Smelting Company, but also would sell to it all the bullion produced from any and all ores smelted by said Smelting Company; which necessarily included ores which the Smelting Company might buy from other parties and treat in its plant.

The ores, then, which the Copper Company was to deliver to the Smelting Company under the contracts, aforesaid, and all the ores which it did, as a matter of fact, deliver under said contracts, were not to be returned to the Copper Company by the Smelting Company, either in their original or their altered form; and the essential elements of a bailment did not exist in the transaction. For, again to quote from Vol. 6, Corpus Juris, p. 1086:

> "It is of the very essence of a contract of bailment that it shall contemplate a return of the property bailed, either in its same or in its altered form."

It is clear, therefore, that the two contracts, above mentioned, under which the Copper Company was to deliver its ores to the Smelting Company did not constitute a contract of bailment; and if the ores were not delivered under a contract of bailment, then the title to the same when delivered did not remain in the Copper Company.

As the contract was not one of bailment, the question arises what was the contract. We will now show that it was a contract of sale, so treated and considered and acted upon by each of the two companies.

THE CONTRACTS AS CONSTRUED BY THE PARTIES.

As each lot of ore was delivered by the Copper Company to the Smelting Company, the Smelting Company executed to the Copper Company an instrument in writing, as each such lot was sampled and assayed; and this instrument was accepted by the Copper Company. This instrument shows what the transaction was.

The instrument referred to is called in the Findings of Fact the "Smelter Return." (Finding 11, rec. p. 68). Each of these instruments, so issued by the Smelting Company upon delivery of each lot of ore, recites:

"Southern Arizona Smelting Company. **Bought** of Imperial Copper Company." (Rec. p. 68).

Then follows in the instrument a description of the property bought, its weight, gross value, charge for treatment, net value, and **the balance** due therefor from the Smelting Company to the Copper Company.

Thus, referring to the "smelter return" set forth in the Findings of Fact (rec. p. 68), it is recited: "Southern Arizona Smelting Company. Bought of Imperial Copper Company". The property is described as "Union ore". The car lot number is given, the weight is given, the assay value in copper, the number of pounds of copper per ton is stated, and the price of the copper per pound is stated, making a gross value of $4.60 per ton. The treatment or smelting charge is given at $2.20 per ton, and this charge deducted from the gross value, leaves the "price per ton" at $2.40, and at this price per ton the total net price of the ore or property is $3,-524.31, as this is stated as the "balance due." This "balance due" was accepted by both the Companies to be the balance due from the Smelting Company to the Copper Company for the ores so shipped and bought by the Smelting Company from the Copper Company, for the particular lot or shipment described in the instrument, or "Smelter Return."

And the court, in its Findings of Fact, further finds: "The net value of each ore shipment so ascertained and shown on each smelter return, was credited to the account of the Imperial Copper Company on the books

of the Smelting Company; and the amount was also credited on the books of the Imperial Copper Company, as representing the value of the ore so shipped by the Copper Company to the Smelting Company." (Finding 11, rec. p. 69).

The identity of the ore, after being sampled, was lost. All the ore shipments were mixed together and the bullion produced was not the bullion of any one particular lot of ore, but the result of all the ores which were mixed together; so that it was impossible ever thereafter to ascertain the amount of bullion into which any particular lot of ore was converted.

The bullion might all have gone up into flue dust and smoke, or the bullion might have run into the slag. It made no difference to the Copper Company. The value of each shipment of ore was determined before such ore was smelted, and that value was agreed upon by both the Companies, as a debt due from the Smelting Company to the Copper Company, to be paid by the Smelting Company, and what became of the ore thereafter was utterly immaterial. The Copper Company simply claimed its debt for the value of the ore as shown by the Smelter Return, and it was that debt which the Smelting Company paid.

Therefore, we say that the transaction between the parties, as shown by the respective instruments in writing executed by the Smelting Company, called "Smelter Returns," was an admission on its part that it had bought each respective lot of ore so delivered to it by

the Copper Company, and that it owed therefor the amounts stated therein as the "balance due." And these "Smelter Returns," which were accepted and acted upon by the Copper Company as being true statements of the transaction, are a binding admission on the part of both Companies that the transaction constituted sales and not bailments. And they are further admission that the balance due as shown in each Smelter Return, was the balance struck and agreed upon by the parties as the balance due upon the particular sale of the particular lot of ore described therein.

If then, each delivery of ore constituted a sale thereof, the title necessarily passed to the purchaser, namely, the Smelting Company, and the Smelting Company became the debtor of the Copper Company for the value, as ascertained and agreed to by both the parties. The Smelting Company became the owner of the ore and at the same time it became the debtor of the Copper Company for its value. The Copper Company parted with the ore, but at the same time it became the creditor of the Smelting Company for the ascertained and determined value thereof.

That this is true is further shown by the fact that the Smelting Company, in purchasing ores from other persons, executed to them similar instruments in writing or smelter returns, of the same form as those executed to the Copper Company. It treated all shippers of ore in the same manner. They were all vendors of ore, and it was a purchaser from each and all of them.

In regard to purchases made from other purchasers of ore the court made the following finding:

> "In addition to smelting the ores for the Imperial Copper Company, the Smelting Company also smelted ores for other persons and corporations, such as the El Tiro Copper Company, the Poland Mining Company, Mackomick Mercantile Company, and others.
>
> A record was kept by the Smelting Company of all ores purchased by it from all such other parties and corporations, down to the time it ceased operations, which showed in detail the weight of the ore, amount of ore shipped, treatment charge and other deductions, and the balance due to the shipper for the lot so shipped. A smelting return was made by the Smelting Company of each lot of ore so shipped to it for each of such other shippers, and payment for the ore was made of the balance, after making the deductions just mentioned; such return being in a form similar to the smelter return heretofore set forth.
>
> The payment for ore so smelted and purchased from other persons by the Smelting Company was made by an order drawn by it upon the Imperial Copper Company, and this order was paid by the Imperial Copper Company and was charged against the account of the Smelting Company." (Finding 14, rec. p. 72-73).

As before stated, the Copper Company charged on its books the value of each shipment of ore which it so made to the Smelting Company, as a debt due to it from the Smelting Company. And, as also heretofore shown, this debt, and all these debts, have been paid by the Smelting Company to the Copper Company, except a

comparatively small balance, heretofore referred to. (Finding 11, rec. p. 69).

In the process of smelting the ore, it was necessary to add fluxes and coke thereto. The Smelting Company itself bought the fluxes, consisting of lime and iron, and itself bought the coke, the total purchases for coke alone amounting to over $500,000. The flux and the coke having been bought by the Smelting Company, undoubtedly belonged to it. This flux was mingled in the smelting process with the mineral, as distinguished from the metal parts of the ore, and made a refuse material, called slag. (Finding 15, rec. p. 73).

Again, in the process of smelting the ore, blasts of air are turned on to the molten mass in the smelter, and this air blast blows not only the smoke, but also fine particles of coke and ore into a stack, all of which is collected in a chamber, and constitutes the flue dust. (Finding 20, rec. p. 76).

If the smelting operation is inefficiently done, nearly all the bullion will run into the slag, and large quantities of undigested particles will be blown into the dust chamber.

According to the theory of counsel for Martin, Trustee, in this case, the Copper Company, after being paid the value of its ore as ascertained by assay sample, before it was smelted at all, is also entitled to recover this slag, although it might contain all the bullion, and the flue dust, although it might contain nearly all the

ore. According to their theory, the Copper Company was entitled to be paid for the ore, and also is entitled to recover the bullion, slag and flue dust into which the ore had been converted. The fallacy of such a contention is too obvious to require consideration.

We have shown that under the contracts and transactions between the Copper Company and the Smelting Company, the ores shipped and delivered to the Smelting Company constituted a sale, and not a bailment; and if this is so, then the title to the ores and to the slag and flue dust into which these ores have been converted, was in the Smelting Company and its Trustee in Bankruptcy, and the lower court erred in holding that the title still remained in the Copper Company, or in Martin, its trustee.

We submit that upon the face of the contracts hereinbefore mentioned, the transaction between the two companies contituted a sale. But if any doubt should arise from the face of these papers themselves, then the construction which the parties themselves have placed upon the transaction, by their course of practice, would be conclusive of the matter.

As is said by the court, in Chisholm vs. Eagle Ore Sampling Company, 75 C. C. A. 472, 144 Fed. 570, supra:

> "It is a familiar rule that, where there is uncertainty as to the true meaning and intent of the contracting parties, the construction which they themselves have put upon it by their voluntary course

of practice, when no controversy existed, is always to be given very great, if not controlling effect."

Chisholm vs. Eagle Ore Sampling Co., 75 C. C. A., 472, 144 Fed. 570.

And the facts in this case show that the Copper Company always treated the delivery of the ore as a sale; that it never claimed the bullion or the flue dust or the slag, and that no such claim was ever made by anyone until Martin, its trustee in bankruptcy, asserted the same.

We therefore submit, that the delivery of the ores by the Copper Company to the Smelting Company constituted a sale and not a bailment. That upon the delivery thereof the title thereto passed to the Smelting Company and the Smelting Company became the debtor of the Copper Company for the value thereof, as ascertained and determined in each smelter reteurn. And as the title to the ores passed to the Smelting Company, it became, and Freeman, its trustee in Bankruptcy now is, the owner of the flue dust and slag dump, being a part of the ores in its altered form, arising from the converting thereof into copper bullion.

THE MONETARY TRANSACTIONS BETWEEN THE TWO COMPANIES.

The Smelting Company did not keep any bank account with any bank (rec. p. 72). The Copper Company was its banker. It deposited with the Copper Company all moneys it received, no matter from what source received, and received a credit therefor.

And so in paying its bills and accounts, it did not draw a check on any bank, but drew vouchers therefor, and annexed thereto or thereon an order to the Copper Company, requesting it to pay the same and charge the payment to its account. And the Copper Company did pay the same, and did charge the same against the account of the Smelting Company. Each Company, however, kept a separate set of books of account. There was no mingling of funds, and no mixing up of their business affairs. (Findings 13, 14, 15, rec. pp. 72, 73, 74).

On July 5th, 1911, when the petition in bankruptcy against the Copper Company was filed, its own books showed that it had been repaid every dollar which the Smelting Company owed it, except a balance of $26,-887.71, which was in the most part for moneys paid it on orders drawn by the Smelting Company, long after it had ceased to ship any ores to the smelter. (Finding 16, rec. p. 73).

The Smelting Company was adjudicated a bankrupt

in September, 1914. Two years before that date, the trustee in bankruptcy of the Copper Company brought suit against the Smelting Company to recover this balance. (Finding 17, rec. p. 74). And after the Smelting Company was adjudicated a bankrupt, Martin, as trustee in bankruptcy of the Copper Company, filed his claim for this identical balance, as a debt due from the Smelting Company to the Copper Company; again asserting that the Copper Company was a creditor for this amount. (Finding 26, rec. p. 80).

These facts are pertinent to show that Martin, Trustee in Bankruptcy of the Copper Company, himself considered the ore transactions between the Copper Company and the Smelting Company, as constituting a sale or sales, for which a balance of the purchase price is unpaid, which balance he is endeavoring to recover as a debt.

This position is utterly inconsistent with his contention in the present case, wherein he claims the transaction was a bailment. He claims a debt, on the theory that the transaction was a sale; and at the same time he claims the property itself on the theory that the transaction is a bailment. He wants to recover both the goods and the price. And the lower court, by its judgment in this case, has permitted him to do so.

THE SMELTING COMPANY WAS NOT A SUBSIDIARY OF THE COPPER COMPANY.

The lower court, as a conclusion of law, from the facts found by it, held that the Smelting Company was a subsidiary of the Copper Company, and used the Smelting Company as an adjunct, agent and instrumentality in its business.

As the Smelting Company has a separate corporate existence; as Martin, Trustee, is now suing the Smelting Company, through Freeman, its trustee in bankruptcy, as a separate and distinct entity, to recover from him the possession of a part of the assets of the Smelting Company, the only question in this case is as to which of the two bankrupt corporations was the owner of the property in controversy. We fail to see that it is at all material in this case, whether the Smelting Company was or was not, a subsidiary corporation of the Copper Company. That is not a material question in this case.

We might further state, that as the creditors of the Smelting Company lent it credit on the strength of the fact that it did business as a separate entity, and owned its property as a separate entity; and as the claims for these debts have been adjudicated by the court of bankruptcy to be valid claims as against the assets and property of said Smelting Company; and as Martin, trustee, by filing the claim of the Copper Company against the Smelting Company, in the bankruptcy proceedings of

the Smelting Company, has made himself a party to that proceeding, and is bound and estopped by every adjudication therein; both he, as trustee of the Copper Company, and the Copper Company itself, are estopped from claiming that the assets of the Smelting Company do not belong to that Company, and are not applicable to the payment of the debts of the Smelting Company.

However, as counsel for Martin, trustee, argued in the lower court that the Copper Company was the real owner of all the assets of the Smelting Company, and for that reason, and irrespective of any other reason, is the owner of the flue dust and slag, we will show that the Smelting Company was not a subsidiary of the Copper Company; that the Copper Company never was the owner of the property or assets of the Smelting Company; and that there is no merit in this contention.

First as to the facts.

The Copper Company was organized in May, 1903, (rec. p. 43). The Smelting Company was organized in August, 1906. Its organizers were Ben Goodrich, A. N. Gage, Henry Kinsley, J. L. Miller and W. F. Walsh, (rec. p. 44). One of these five men, A. N. Gage, was at the time a director of the Copper Company; the others were not directors of the Copper Company. (rec. p. 46). Therefore, any statement to the effect that either the Copper Company, or its directors, organized the Smelting Company, or caused it to be organized, is not supported by the facts as found by the court and agreed to by the parties.

After the Smelting Company commenced operating in 1907, the following five persons were and remained its officers and directors, to-wit:

E. B. Gage, President.

W. F. Staunton, Vice-President and Gen. Mgr.

A. N. Gage, Secretary and Treasurer.

H. M. Robinson, Director.

F. M. Murphy, Director. (rec. p. 46).

and these five persons were also in 1907 and thereafter, directors of the Copper Company; E. B. Gage being its President, A. N. Gage its Secretary and Treasurer, and W.F. Staunton its Vice-President and General Manager. (rec. p. 46).

Each company, from 1907 on, had practically the same officers and directors.

On December 21, 1908, the Copper Company owned practically all of the issued capital stock of the Smelting Company, amounting to about 9,000 shares. (rec. p. 84). On that day, however, the Copper Company did assign and pledge all these shares of stock to the Bankers Trust Company, as further security for its $2,000,000 of bonds. (Findings 28, 29, rec. pp. 81 and 82), And from that date on, the only interest the Copper Company had in these shares was its right to redeem by paying the debt for which the same stood pledged.

In July, 1911, the Bankers Trust Company brought suit against the Copper Company to foreclose its said lien or pledge on said stock, and thereafter the lien was foreclosed by the decree of the State Court, and the shares were ordered sold; the same were sold to Leo Goldschmidt; the sale was confirmed by the court; and Leo Goldschmidt became, and he and his assigns now are, the owners of all these shares of stock. (Findings 36, rec. p. 90).

The assets of a corporation belong to its stockholders, subject only to the payment of the corporate debts.

The assets of the Smelting Company belong therefore, to its stockholders, namely, Leo Goldschmidt and his assigns, subject only to the payment of the corporate debts.

The Smelting Company has been adjudicated a bankrupt. Its assets, therefore, are being administered by its trustee in bankruptcy for the benefit of its creditors; and these creditors have filed and had allowed claims aggregating over $60,000.

The first moneys realized from the sale of these assets must be paid to the creditors whose claims have been filed and allowed, after taxes and administration expenses are paid.

But, if after these costs and the claims of the creditors are paid in full, a balance of assets or money should remain in the hands of the trustee in bankruptcy, to whom would those remaining assets belong? Clearly,

to the stockholders of the Smelting Company; that is, to Leo Goldschmidt and his assigns, who are the stockholders.

But the learned counsel for Martin, Trustee, argued in the lower court, and it is fair to presume they will argue in this court, that those remaining assets will belong to Martin, as trustee of the Copper Company, because the Copper Company once owned the stock.

And because the Copper Company once did own this stock, they will claim that the Smelting Company was a subsidiary corporation of the Copper Company, its agent and instrumentality, and ever since has so remained. They will assert, that although the Copper Company assigned and pledged that stock as security for a debt, which debt has never been paid; that although the pledge has been foreclosed by sale, and the stock sold and paid for by a third party, nevertheless, the Copper Company, or its trustee in bankruptcy, is the owner of the assets which are represented by that stock.

And they will further assert, as they did in the court below, that although neither the Copper Company, nor Martin, its trustee in bankruptcy, owns one share of the capital stock of the Smelting Company, nevertheless, the Copper Company, or Martin, as its Trustee, owns the Smelting Company itself, and all its assets. They will further assert, as they did in the court below, that Leo Goldschmidt and his assigns, who by purchase of the stock at foreclosure sale, became the owner of all the right, title and interest which the Copper

Company owned therein, on the 21st day of December, 1908, when it pledged the stock to the Bankers Trust Company, is not the owner of the assets of the corporation whose capital stock he purchased; that those assets do not belong to the stockholders but do belong to the Copper Company, because it once did own that stock.

Such a contention seems too absurd to merit any consideration. But it was urged upon the court below; and we presume it will be urged before this court.

The lower court found as a fact: That on December 21, 1908, the Copper Company, then being the owner of practically all the issued capital stock of the Smelting Company did assign and pledge the same to the Bankers Trust Company as security for a debt. (Finding 29, rec. p. 82); that the Bankers Trust Company caused this stock to be transferred to itself on the books of the Smelting Company, before bankruptcy proceedings were instituted against the Copper Company. (Finding 29, rec. p. 82).

So then, at the time the petition to have the Copper Company adjudged a bankrupt was filed, the Bankers Trust Company stood upon the books of the Smelting Company, as the owner of the stock, and the Copper Company did not stand as such owner.

The right of the Copper Company to redeem this stock by paying the debt for which it was pledged as security, is conceded. This right was recognized by the Bankers Trust Company, when on July 3, 1911, it

brought suit against the Copper Company to foreclose the pledge or lien.

But the Copper Company did **not** redeem its pledge. On the contrary it failed to do so, and in the foreclosure suit the stock was decreed to be sold by the court, and the stock was sold under this decree, and all the right and interest of the Copper Company thereto was forever barred and ended. (Finding 34, rec. p. 87).

The purchaser of the stock at that foreclosure sale necessarily purchased all the right, title and interest thereto and therein, which the Copper Company had on December 21, 1908, the day when it pledged the same. And if, o nthat day, the Copper Company, by virtue of being the owner of that stock, was the owner of the assets of the Smelting Company, then those assets passed to the purchaser of the stock at the foreclosure sale.

If the Smelting Company was a subsidiary corporation of the Copper Company on December 21, 1908, by virtue of the Copper Company owning all the capital stock of that company on that day, then, when the Copper Company pledged that stock, it pledged all the assets represented by that stock. And the foreclosure of the pledge and the sale of the stock thereunder, vested the purchaser with all the rights to the assets of the Smelting Company which on December 21, 1908, the Copper Company had.

We cannot conceive how anyone can claim, that because a parent corporation is the real owner of the as-

sets of a subsidiary corporation by reason of its owning all the stock of such subsidiary corporation; it continues to be such parent corporation and the owner of all the assets of the subsidiary corporation, after it has sold and no longer owns the stock of such subsidiary corporation.

One corporation can only be subsidiary to another corporation when all its stock is owned by such other corporation. When the parent corporation parts with that stock, the new stockholders have control of the subsidiary corporation. It is no longer a subsidiary corporation to the other corporation, for that other corporation has no control over it, and no interest in the assets represented by its stock.

We will not pursue this discussion further. We will leave it to the learned counsel for Martin, Trustee, to explain to this court upon what principle of law or justice one corporation can be held to be the subsidiary of another corporation, when that other corporation does not own one share of its capital stock.

THE STATUTE OF LIMITATIONS

The Smelting Company, by George W. Dietz, its Secretary and acting manager, took possession of said flue dust and slag, on August 15, 1910, claiming ownership and right of possession thereof, and from that date down to the 31st day of October, 1914, when said Smelting Company delivered possession of said property to M. P. Freeman, its trustee in bankruptcy, a period of four years, two months and sixteen days, the Smelting Company has remained in possession of said property, claiming the ownership thereof. (Finding 21, rec. p. 77).

If this flue dust and slag dump was the property of the Copper Company, then the Smelting Company, by taking possession thereof and claiming it as its property, was guilty of conversion or other wrongful appropriation of the property of the Copper Company, and the Copper Company had a cause of action against it.

That cause of action accrued on August 15, 1910. But no suit was commenced upon this cause of action until 1915, more than four years after the cause of action accrued, and therefore, the cause of action against the Smelting Company, and against its trustee in bankruptcy, for the recovery of that property, is barred by the provisions of sections 710 and 716 of the Revised Statutes of Arizona of 1913.

The sections of the statutes of Arizona referred to, are as follows:

"710. There shall be commenced and prosecuted within **two** years after the cause of action shall have accrued, and not afterward, all actions or suits in court of the following description:.....

(3) Actions for detaining the personal property of another and for converting such personal property to one's own use.

(4) Actions for taking or carrying away the goods and chattels of another."

Sec. 710 Revised Statute of Arizona of 1913.

> "716. Every action other than for the recovery of real estate for which no limitation is otherwise prescribed, shall be brought within four years next after the right to bring the same shall have accrued, and not afterward."

Sec. 716 Revised Statute of Arizona of 1913.

The present suit of Martin, Trustee, is barred by the statute of limitations which was duly pleaded, (rec. p. 17) and for that reason also the court erred in adjudging the property in dispute to be the property of the Copper Company, or its trustee in bankruptcy.

RESUME.

We therefore submit:

1. That as the contract under which the Copper Company delivered its ores to the Smelting Company constituted a contract of sale, and not a contract of bailment, the title to those ores passed to the Smelting Company, and those ores in their original or in their altered form of bullion, flue dust and slag, became the property of the Smelting Company.

2. That the contract between the two Companies, in regard to the delivery and smelting of the ore, was a completed and executed contract, before the Copper Company was adjudicated a bankrupt. All the ores had been delivered; all had been sampled and assayed; the total value thereof, as agreed upon by the parties and shown by the assay returns, had been charged as a debt or debts due from the Smelting Company; all the ores had been smelted; all the bullion had been sold, and the entire debt due from the Smelting Company to the Copper Company, except a comparatively small balance, had been paid. Therefore, those ores, in their original or altered form, became and were the property of the Smelting Company.

3. The claim of Martin, Trustee, that the Copper Company, or he, as its trustee, is the owner of those ores, or any of them, either in their original form as ores, or in their altered form as flue dust and slag, is ut-

terly without merit, and the judgment of the lower court decreeing him to be the owner and entitled to the possession thereof is erroneous and should be reversed.

4. And in any event, the right of action of the Copper Company, and of its trustee in bankruptcy, to recover said ores, in their altered form as flue dust and slag, is barred by the statute of limitations, for the reason that this right of action arose in August, 1910, and the present suit was not brought until 1915, over four years after the cause of action arose.

We, therefore, ask, that the judgment and decree in this case be reversed, and the case be remanded with directions to the lower court to enter judgment and decree in favor of M. P. Freeman, Trustee in Bankruptcy of Southern Arizona Smelting Company, and as prayed for in his Answer herein.

Respectfully submitted,

SELIM M. FRANKLIN,

ELLINWOOD & ROSS,

Attornies for M. P. Freeman,
Trustee, etc., Appellant.

No. 2824

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

In the Matter of SOUTHERN ARIZONA SMELTING COMPANY, a Corporation, Bankrupt,

M. P. FREEMAN, as Trustee in Bankruptcy of SOUTHERN ARIZONA SMELTING COMPANY, a Corporation, Bankrupt,

Appellant,

vs.

JOHN H. MARTIN, as Trustee in Bankruptcy of IMPERIAL COPPER COMPANY, a Corporation, Bankrupt,

Appellee.

ADDITIONAL BRIEF ON BEHALF OF APPELLANT.

Filed
OCT 2 - 1916
F. D. Monckton,
Clerk.

EVERETT E. ELLINWOOD,
JOHN M. ROSS,
LESLIE C. HARDY,
Solicitors for Appellant,
Bisbee, Arizona.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

In the Matter of SOUTHERN ARIZONA SMELTING COMPANY, a Corporation, Bankrupt,

M. P. FREEMAN, as Trustee in Bankruptcy of SOUTHERN ARIZONA SMELTING COMPANY, a Corporation, Bankrupt,

Appellant,

vs.

JOHN H. MARTIN, as Trustee in Bankruptcy of IMPERIAL COPPER COMPANY, a Corporation, Bankrupt,

Appellee.

STATEMENT

Appellant's counsel have filed in this cause a brief which treats generally upon all of his assignments of errors. It is our purpose, by this additional brief, to treat only upon the first assignment of error (Tr. 98) in so far as it relates to the following conclusion of law of the trial court:

> "That the Southern Arizona Smelting Company, a corporation, was a subsididary of the Imperial Copper Company, a corporation, created and used by the Imperial Copper Company for its convenience in the transaction of its business; that said Imperial Copper

Company was the parent corporation of said Southern Arizona Smelting Company, and used said Southern Arizona Smelting Company as an adjunct, agent and instrumentality in the transaction of its business." (Tr. 92.)

This controversy involves a suit between appellant, as trustee of the Imperial Copper Company (hereinafter called Copper Company), and appellee, as trustee of the Southern Arizona Smelting Company (hereinafter called Smelting Company), for the ownership and possession of a certain quantity of flue dust and a slag dump situate upon the premises of appellee. In support of its conclusion of law that the appellee is entitled to the ownership and possession of this flue dust and slag dump, the trial court found, first, that the appellee was used as the "adjuncct, agent and instrumentality" in the transaction of appellant's business; and, secondly, that the contract between appellant and appellee for smelting the former's ores constituted a bailment and not a sale. (Tr. 92.)

The conclusion of law of the trial court that the Smelting Company was used as the mere "adjunct, agent and instrumentality" of the Copper Company is, in our opinion, so important, as a precedent for the conduction of corporate business, and so palpably erroneous, in view of the findings of fact, that we deem it necessary to discuss it separately.

ARGUMENT

It is not disputed that the Copper Company was the owner of practically all the issued stock of the Smelting Company before this stock was judicially sold to satisfy a lien of a deed of trust executed by the Copper Company to the Bankers Trust Company (Tr. 90) which antedated the findings of fact and conclusion of law. By virtue of this stock ownership, at that time, the relationship of holding corporation and subsidiary existed between the Copper

Company and the Smelting Company, respectively, but this did not necessarily make the latter the "adjunct, agent or instrumentality" of the former.

> "The mere fact that the stockholders in two or more corporations are the same, or that one corporation exercises control over the other through ownership of its stock, or through identity of its stockholders, does not make either the agent of the other, nor does it merge them into one, so as to make a contract of one corporation binding upon the other, where each corporation is separately organized under a distinct charter. (Citation of authorities.) True, the legal fiction of a distinct corporate existence will be disregarded when necessary to prevent fraud, or when a corporation is so organized and controlled and its affairs so conducted, 'as to make it only an adjunct, or instrumentality of another corporation.' (Citation of Authorities.) But, 'it requires a strong case to induce a court of equity to consider two corporations as one, on account of one owning all of the capital stock of the other.' (Citation of authorities.)"
>
> *Pittsburg & Buffalo Co. v. Duncan, et al., 232 Fed. 584.*

The foregoing is a late and clear statement of the rule for determining when one corporation should be considered the adjunct, agent or instrumentality of another. It does not result merely from stock ownership. Nor does such a relationship exist when it appears that a separate organization is maintained and a separate business is conducted. The case of *In re Watertown Paper Company, 169 Fed. 252,* is illustrative of this. In that case the stockholders of the Watertown Paper Company organized a separate corporation and called it the H. Remington & Son Pulp & Paper Company. The stock of one was virtually owned by the stockholders of the other. The Pulp Company was financed, during its organization period, from the funds of the Paper

Company. The Paper Company became bankrupt and the Pulp Company presented its claim for merchandidse furnished by it to the Paper Company. The claim was rejected, as was stated, because there was such an identity of corporate interests that a claim presented by the one against the other was nothing more or less than the bankrupt presenting a claim against itself. The Circuit Court of Appeals, however, in reversing the District Court, said:

> "The case thus presented is one in which the stockholders of two corporations are largely the same, in which both corporations have been under the same management, and in which their affairs have for years been involved and intermingled; and the legal question is whether these relations prevent the one corporation from enforcing against the bankrupt estate of the other a claim which, in case the latter corporation had remained solvent, would have been both valid and enforceable. * * * *"
>
> "Now it is an elementary and fundamental principle of corporation law that a corporation is an entity separate and distinct from its stockholders *and from other corporations with which it may be connected.* (Italics ours.) The fact that the stockholders of two separately chartered corporations are identical, that one owns shares in another, and that they have mutual dealings, will not, as a general rule, merge them into one corporation, or prevent the enforcement against the insolvent estate of the one of an otherwise valid claim of the other. As said by the Supreme Court of Arkansas, in *Lange v. Burke, 69 Ark. 85. 88, 61 S. W. 165,* in holding, in a case where two corporations were practically controlled by the same stockholders and had had intimate business relations, including the employment of the same bookkeeper, that a claim of one corporation would be enforced against the estate of the other:
>
> " 'A corporation is an artificial being, separate and distinct from its agents, officers, and stockholders. Its

dealings with another corporation, although it may be composed in part of persons who own a majority of the stock in each company, and may be managed by the same officers, if they be in good faith and free from fraud, stand upon the same basis, and affect it and the other corporation in the same manner and to the same extent, that they would if each had been composed of different stockholders and controlled by different officers.' "

And as said by the Circuit Court of Appeals for the Sixth Circuit in *Richmond, etc., Const. Co. v. Richmond, etc., R. Co., 68 Fed. 105, 108, 15 C. C. A. 289, 34 L. R. A. 625:*

" 'The contract company was a legal corporation, wholly distinct and separate from the railroad company. The fact that the stockholders in each may have been the same persons does not operate to destroy the legal identity of either corporation. Neither does the fact that the one corporation exercised a controlling influence over the other, through the ownership of its stock or through the identity of stockholders, operate to make either the agent of the other, or to merge the two corporations into one.' "

With this premise the court thereupon makes the following conclusion:

"Unless, therefore, it can be shown that some exception to the general rule of separate corporate existence and liability applies in this case, it must follow that the claim of the Pulp Company should have been allowed. The only exceptions to that rule possibly applicable here are: (1) The legal fiction of distinct corporate existence will be disregarded, when necessary to circumvent fraud. (2) It may also be disregarded in a case where a corporation is so organized and controlled, and its afairs are so conducted, as to make it merely an instrumentality or adjunct of another corporation."

* * * * * * *

"It is true that the two corporations mingled their

affairs. A creditor of the one company might perhaps have a claim, based upon principles of estoppel, against the other. Lax business methods are clearly shown. Undoubtedly the controlling stockholders regarded the two corporations as being, in a general way, different departments of their business. But the separate corporate organizations were apparently kept up. Each corporation had its own creditors, its own assets, and conducted its business in its own name. Books of account were kept, showing their financial relations. The stockholders were not entirely the same. We cannot, upon these facts, hold that the corporations were identical, nor that the Pulp Company was merely an adjunct or instrumentality of the Paper Company. Instead of coming under the exceptions, this case seems clearly to come within the general rule that the distinct corporate existence of two separate although associated corporations will be regarded by the courts."

From the decisions of the Circuit Court of Appeals for the Sixth Circuit in the case of *Pittsburgh & Buffalo Co. v. Duncan, et al., Supra,* and of the Circuit Court of Appeals for the Second Circuit in the case of *In re Watertown Paper Co., Supra,* we deduce the following:

(1) The mere fact that one corporation exercises control over another by virtue of stock ownership, or through identity of stockholders, does not merge them into one and destroy their corporate existence.

(2) Where separate corporate organizations are actually maintained, even though there be a unity of interest and control, one corporation will not be judicially considered the adjunct, agent and instrumentality of the other.

(3) The general rule that a corporation is an entity, separate and apart from its stockholders, will be regarded, unless necessary to circumvent fraud, and where one corporation is the adjunct, agent and instrumentality of another, and then only in the clearest cases.

There is no imputation of fraud in the case at bar, so we may at once eliminate that exception to the general rule of separate corporate existence. If the statement of facts discloses that the Smelting Company is the adjunct, agent and instrumentality of the Copper Company, it must be because of the remaining exception to the general rule, and then only because of the clearest reason.

We confidently assert that the findings of fact disclose that both the Copper Company and the Smelting Company maintained separate corporate organizations and disjointly exercised their corporate privileges. Let us briefly analyze the statement of facts.

Immediately after the organization of the Smelting Company, contracts were executed with it by the Copper Company for building a smelter. These contracts were based upon a valuable consideration, namely, the transfer of 7,995 shares of stock of the Smelting Company to the Copper Company, and the smelting of the latter's ores, the Copper Company in turn constructing the smelter and furnishing the premises upon which the smelter was constructed. (Tr. 47 et. seq. and 63 et. seq.)

About the time the Smelting Company was ready to begin operations it executed a contract, as party of the first part, with the American Metal Company, Limited, as party of the second part, and the Copper Company, as party of the third part, for refining the bullion to be smelted by the Copper Company. This contract was executed by the Smelting Company in its individual, corporate capacity. (Tr. 52 et seq.)

The ores shipped by the Copper Company to the Smelting Company were assayed by an agent of both companies. (Tr. 67.) Smelter returns were made by the Smelting Company and delivered to the Copper Company. (Tr. 67.)

The value of the ores shipped to the Smelting Company

by the Copper Company was entered upon the books of both companies. The bullion was shipped by the Smelting Company to the American Metal Company and an "Account Sales" was rendered by the latter company to the Smelting Company, but the proceeds of the sale eventually reached the Copper Company. (Tr. 69.)

The Copper Company and the Smelting Company kept separate books, and accounts between them were balanced monthly. (Tr. 72.)

The Copper Company kept all funds realized from smelting and refining the ores, and paid the bills of the Smelting Company, the amount of which ~~were~~ was charged against the account of the last-named company. (Tr. 72.)

Both companies kept an account of the coke and flux purchased. (Tr. 73.)

The trustee in bankruptcy of the Copper Company brought suit against the Smelting Company upon a balance due for moneys paid for the Smelting Company on account of labor, materials, etc. (Tr. 74.)

The creditors of the Smelting Company presented their claims to it for adjudication and not to the Copper Company. (Tr. 81.)

The Copper Company issued its mortgage bonds to the Bankers Trust Company, and secured them with a deed of trust conveying all of its real and personal property. (Tr. 44.) Thereafter, as further security, the stock of the Smelting Company, owned by the Copper Company, was pledged to the Bankers Trust Company. (Tr. 81.) Thereafter suit was filed to foreclose the deed of trust, so executed, and said stock, among other property, was sold to pay said bonded indebtedness. (Tr. 87.)

We have synopsised the statement of facts to show that both the Copper Company and the Smelting Company

maintained separate corporate organizations. The Copper Company itself recognized the separate corporate entity of the Smelting Company, because it brought suit in its corporate capacity against the Smelting Company in its corporate capacity, for debt. (Tr. 74.) The bankruptcy creditors of the Copper Company evidently considered the Smelting Company a separate entity when they filed their claims against it and not the Copper Company. (Tr. 81.) Indeed, the conclusion of law of the trial court that "the contract under which said ores were so shipped by the Imperial Copper Company, and smelted by the Southern Arizona Smelting Company, constituted a bailment and not a sale" (Tr. 92) seems to completely refute the conclusion of law, of which we now complain, that the Smelting Company was the adjunct, agent and instrumentality of the Copper Company. How could there be a contract of bailment between the Copper Company and the Smelting Company if there was no separateness of corporate existence between them? It is just as impossible for a corporation to contract with itself as it is for an individual, and this is what the trial court said the Copper Company did by its conclusion of law that the Smelting Company was used as the adjunct, agent and instrumentality of the Copper Company, for by so finding it absolutely merged the two corporations and thereby destroyed their separate corporate entity. *Pittsburgh & Buffalo Co. v. Duncan, et al.,* and *In re Watertown Paper Company, Supra.*

Apparently, the learned trial court concluded that, at the time of the organization of the Smelting Company, and until the Copper Company ceased to own any of its stock, the Smelting Company was used as a mere adjunct or instrumentality of the Copper Company. But when the Copper Company, through the pledge and foreclosure above mentioned, ceased to be the owner of any stock in the Smelt-

ing Company the link which connected them was broken and the Smelting Company thenceforward must be treated as a distinct corporate entity. As appears from the findings of fact, when the Copper Company went into bankruptcy, it was not the record owner of any of the shares of stock of the Smelting Company. The trustee in bankruptcy of the Copper Company therefore must take the condition as he found it and manifestly could claim no better title to the capital stock of the Smelting Company than that held by the Copper Company at the date of adjudication. Considering the matter in this light the trial court evidently concluded that, although the Smelting Company was originally organized and used as a mere instrumentality or adjunct of the Copper Company, it could no longer be treated as such, but, in view of the condition of stock ownership, above mentioned, subsisting when the Copper Company was adjudicated a bankrupt, and when the petition in bankruptcy was filed against it, the corporate identity of the Smelting Company must be recognized. Therefore it was concluded that the Copper Company and Smelting Company might contract with each other and that the Smelting Company could be made the bailee of the Copper Company. The trial court's conclusion that the Smelting Company was used as a mere instrumentality, *et cetera,* of the Copper Company therefore became immaterial and irrelevant so far as the issues in this proceeding were concerned.

It seems that every one of the findings of fact negative the conclusion of law that the Smelting Company was the "adjunct, agent and instrumentality" of the Copper Company. At the most it cannot be said that this is a case sufficiently clear to disregard the separate existence of the two corporations. For our part we cannot see any distinction between the facts here involved and those disclosed in the case of *In re Watertown Paper Co., Supra.* If there the

Paper Company and Pulp Company maintained separate corporate organizations, then here the Copper Company and Smelting Company certainly did so.

No matter how this litigation may terminate, it will doubtless be conceded by everyone that the creditors of the Smelting Company have a prior right to resort to the assets of the Smelting Company for satisfaction of their claims. If appellee's contentions are eventually sustained it would mean that the creditors of the Copper Company would be entitled to any surplus assets of the Smelting Company after the Smelting Company's creditors were paid in full. In other words, the creditors of the Copper Company would simply take unto themselves the equity which is now held by the purchasers of the Smelting Company's stock at foreclosure sale. It is inconceivable that the creditors of the Copper Company will ever be permitted, after the Copper Company has sold and disposed of its interest in the Smelting Company in satisfaction of its mortgage debt, to take that very property away from the purchasers at foreclosure and again make it a part of the assets of the Copper Company, unless, indeed, there should be some showing of fraud or conspiracy, which is not suggested in the record here. But the most that the creditors of the Copper Company could get would be a right to the surplus assets of the Smelting Company after its bona fide creditors are paid.

It appears from the findings that the time has long since passed within which the creditors of the Smelting Company might prove their claims against the Copper Company, if they had any basis for doing so. It cannot be certainly assumed that the assets of the Smelting Company, including the slag dump and flue dust involved in this proceeding, will be sufficient to satisfy the Smelting Company's debts and the costs of administration in the bankruptcy proceedings now pending against the Smelting Company. Upon

what theory, therefore, may the trustee of the Copper Company be permitted to proceed piecemeal to take away from the Smelting Company assets in which the Smelting Company's creditors have an equity prior to that of the Copper Company's creditors? If this slag dump and flue dust are taken away from the Smelting Company's creditors in this proceeding upon the theory that the Smelting Company was a mere dummy, then it may, and probably will, result that the Smelting Company's creditors will be unable to satisfy their just claims against this property in which they have a prior right. We are satisfied that the learned trial court, fully familiar with the many angles of litigation in which these companies are involved, would never have awarded this slag dump and flue dust to appellee except upon the theory that the Smelting Company held this property as bailee for the Copper Company, that is to say, upon the theory that the corporate entity and character of the Smelting Company may not be ignored but must be recognized and preserved. It is upon this theory alone that the conclusions of the trial court must rest if they are to be sustained. Therefore it is clear, for this additional reason, that the conclusion of the trial court that the Smelting Company was a mere dummy corporation was and is wholly irrelevant and immaterial.

CONCLUSION

As said at the outset, we felt constrained to separately impress upon this court the importance and, in our opinion, the palpably erroneous, immaterial and irrelevant conclusion of the trial court that the Smelting Company was used as an adjunct, agent and instrumentality of the Copper Company. We are sure that the trial court also erred in its remaining conclusion that the contract for smelting the ore

constituted a bailment and not a sale. So we contend the decision of the lower court should be reversed, and the case remanded with directions to enter a decree in favor of appellant as prayed for in his answer.

Respectfully submitted,

EVERETT E. ELLINWOOD,
JOHN M. ROSS,
LESLIE C. HARDY,
Solicitors for Appellant,
Bisbee, Arizona.

No. 2824

In the
United States Circuit Court of Appeals
for the Ninth Circuit

In the Matter of SOUTHERN ARIZONA SMELTING COMPANY, a Corporation, Bankrupt.

M. P. FREEMAN, as Trustee of SOUTHERN ARIZONA SMELTING COMPANY, a Corporation, Bankrupt,
Appellant,

vs.

JOHN H. MARTIN, as Trustee of IMPERIAL COPPER COMPANY, a Corporation, Bankrupt,
Appellee.

BRIEF OF JOHN H. MARTIN
Trustee, Etc., Appellee.

Filed
OCT 7 - 1916
F. D. Monckton,
Clerk.

FRANCIS M. HARTMAN,

EDWIN F. JONES,
Attorneys for John H. Martin,
Trustee, etc., Appellee.

In the
United States Circuit Court of Appeals
for the Ninth Circuit

In the Matter of SOUTHERN ARIZONA SMELTING COMPANY, a Corporation, Bankrupt. M. P. FREEMAN, as Trustee of SOUTHERN ARIZONA SMELTING COMPANY, a Corporation, Bankrupt, *Appellant,* vs. JOHN H. MARTIN, as Trustee of IMPERIAL COPPER COMPANY, a Corporation, Bankrupt, *Appellee.*	No. 2824

BRIEF OF JOHN H. MARTIN
Trustee, Etc., Appellee.

STATEMENT OF THE CASE

We desire to controvert the statement of the case in some respects, as made by Counsel for Appellant in his brief, and we therefore submit the following as our statement of the case.

The property involved consists of about ten thousand tons of smelter flue dust, valuable for its copper

contents, and a slag dump of many thousand tons, situate at the town of Sasco, Pinal County, Arizona.

This action was originally instituted as a summary proceeding before the Referee in Bankruptcy at Tucson, Arizona, in the Matter of the Southern Arizona Smelting Company, a corporation, bankrupt, by John H. Martin, Trustee in Bankruptcy of the Imperial Copper Company, a corporation, Bankrupt, appearing in such first named bankruptcy proceeding and claiming the flue dust and slag as a part of the assets of and as belonging to the estate of the Copper Company, both of which Bankruptcy proceedings were pending before the same Referee.

Martin, Trustee of the Copper Company based his claim to the flue dust and slag upon two grounds:

First: That the flue dust and slag were produced by smelting the ores of the Copper Company—ores which came out of the mines of the Copper Company and ores which the Copper Company purchased and paid for; that the values in the flue dust, to-wit, the mineral contents, came out of such ores so belonging to the Copper Company or purchased by it.

That the Copper Company did not sell such ores to the Smelting Company; that the Smelting Company did not purchase such ores from the Copper Company.

That there was a formal agreement between the Copper Company and the Smelting Company to the effect that the Smelting Company should only be allowed

a credit with the Copper Company for smelting said ores, of the cost per ton of such smelting, and that said agreement did not provide that the flue dust and slag should belong to the Smelting Company.

That the Smelting Company did not receive any of the proceeds of the bullion or products resulting from such smelting, but that the Copper Company received all of such proceeds and handled and disposed of the same.

Second: That the Copper Company was the parent company of the Smelting Company; that the Smelting Company was simply a subsidiary of the Copper Company; that the Copper Company created the Smelting Company as a subsidiary and auxiliary corporation for its convenience in the transaction of its business of mining and smelting, and for the purpose of smelting the ores from its mines and other ores which the Copper Company might purchase; that the Smelting Company was not an independent concern, but was simply created and used by the Copper Company as an adjunct, agent and instrumentality in its said business.

The case was before the District Court three times.

Freeman, Trustee of the Smelting Company, objected to the jurisdiction of the Referee to hear and determine the question of title and ownership of the property in the summary proceeding, which objection was overruled by the Referee, the property being in the possession of the bankruptcy court, from which ruling Freeman, trustee, appealed, by petition for review, to the District

Court. The District Court sustained the ruling of the Referee and referred the case back to the Referee with directions to take the evidence. Voluminous evidence, oral and documentary was taken before the Referee, who held that the flue dust and slag belonged to Freeman, Trustee, from which order Martin, Trustee, appealed, by petition for Review, to the District Court, taking up the entire record, including all the documentary evidence and transcript of all the oral testimony.

It was then stipulated that the case should be treated and proceeded with in the District Court, as a plenary action entitled John H. Martin, Trustee, etc., vs. M. P. Freeman, Trustee, etc., and all the evidence taken before the Referee, oral and documentary, was submitted to th District Court.

The parties agreed to findings of fact which were adopted by the Court.

The District Court thereafter rendered its conclusions of law and decree, as follows:

"CONCLUSIONS OF LAW

"The Court having heretofore made and filed its Findings of Fact in the above-entitled matter, does now make its Conclusions of Law therefrom, as follows:

"CONCLUSIONS OF LAW

That the Southern Arizona Smelting Company, a corporation, was a subsidiary of the Imperial Copper Company, a corporation, created and used by the Imperial Copper Company for its convenience in the transaction of its business; that said Imperial Copper Company was the parent corporation of said Southern Arizona Smelting Company, and used said Southern Arizona Smelting as an adjunct, agent and instrumentality in the transaction of its business.

That all of the ores shipped by the Imperial Copper Company to the Southern Arizona Smelting Company, and the title thereto, as well as the title to all of the flue dust and slag dump arising from the Smelting of said ores by the Southern Arizona Smelting Company remained in the Imperial Copper Company; that the contract under which said ores were so shipped by the Imperial Copper Company, and smelted by the Southern Arizona Smelting Company, constituted a bailment and not a sale; that said slag dump and flue dust is the property of the estate of the Imperial Copper Company, bankrupt, and John H. Martin, as Trustee in Bankruptcy of said Imperial Copper Company, bankrupt, is entitled to the possession of said property; and that the estate of said Southern Arizona Smelting Company has no title or right to the said slag dump and flue dust and that said M. P. Freeman, as Trustee in Bankruptcy of said Southern Arizona Smelting Company, bankrupt, has no right, title or interest in or to

any of said property, and is not entitled to the possession thereof."

"DECREE

"This cause coming on to be further heard at this term on the 14th day of June, A. D. 1916, the same having been heretofore argued by respective counsel and submitted to the Court; and the parties having heretofore stipulated and agreed in open court to the findings of fact herein, which said findings of fact the Court did adopt and file as its findings of fact herein; the plaintiff appearing by his counsel, Francis M. Hartman, Esq., and Edwin F. Jones, Esq., and the defendant appearing by his counsel, Selim M. Franklin, Esq., and the Court being now fully advised in the premises, thereupon, upon consideration thereof, it was ordered, adjudged and decreed as follows:

"(1) That the estate of said The Imperial Copper Company, a corporation, bankrupt, is the owner of all of that certain property mentioned and described in the petition of John H. Martin, Trustee in Bankruptcy of the Estate of The Imperial Copper Company, a corporation, bankrupt, on file herein, to-wit:

"A certain lot of flue dust, estimated to contain ten thousand (10,000) tons, more or less; and also a certain slag dump, all situated at the smelting plant of said Southern Arizona Smelting Company, a corpora-

tion, bankrupt, at the town of Sasco, Pinal County, Arizona, and that the said John H. Martin, Trustee in Bankruptcy of the estate of said Imperial Copper Company, a corporation, bankrupt, is entitled to the possession of all of said flue dust and slag.

"(2) IT IS FURTHER ORDERED, ADJUDGED AND DECREED that neither the estate of the said Southern Arizona Smelting Company, a corporation, bankrupt, nor the said M. P. Freeman, Trustee in Bankruptcy of the said estate of the Southern Arizona Smelting Company, a corporation, bankrupt, has any right, title or interest whatsoever in or to any of said flue dust or said slag, and that the said M. P. Freeman, as such trustee of the Southern Arizona Smelting Company, a corporation, bankrupt, is not entitled to the possession of the same.

"(3) IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the said M. P. Freeman, Trustee in Bankruptcy of said Southern Arizona Smelting Company, a corporation, bankrupt, be and he hereby is ordered and directed to turn over and deliver unto the said John H. Martin, Trustee in Bankruptcy of the estate of said Imperial Copper Company, a corporation, bankrupt, all of said flue dust and slag, and

"(4) IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the said John H. Martin, Trustee in Bankruptcy of the estate of said Imperial Copper Company, a corporation, bankrupt, do have and recover of and from the estate of said Southern Arizona Smelt-

ing Company, a corporation, Bankrupt, and from M. P. Freeman, Trustee in Bankruptcy of said estate of said Southern Arizona Smelting Company, a corporation, bankrupt, his costs and disbursements incurred herein, amounting to the sum of Ten ($10.00) Dollars."

From this judgment and decree, M. P. Freeman, Trustee, appeals to this court.

The District Court had before it not only the findings of fact agreed upon by the parties but **all** the evidence, oral and documentary, and we insist that its conclusions and judgment were correct, and that its judgment and decree should be affirmed.

Counsel for appellant, in their brief as we understand it, discuss three legal questions, although but one is specified in their specifications of error.

(1) That the Smelting Company was not a subsidiary of the Copper Company.

(2) That the Smelting Company absolutely purchased the ores from the Copper Company.

(3) Statute of limitations.

The first question can be determined by an examination of the facts relating to the organization of the two companies, the manner in which the business was conducted, etc., and the application thereto of well known legal principles.

If the Smelting Company was merely a subsidiary,

adjunct, agent and instrumentality of the Copper Company and used as such for its convenience in the transaction of its business, then it follows that, not only the flue dust and slag, but all of the property held in the name of the Smelting Company belongs to and is the property of the Copper Company and subject to its debts.

In order to properly determine the second question it is necessary to take into consideration the relationship existing between the Copper Company and the Smelting Company, the manner in which the business was transacted, as well as the construction or interpretation of the contract referred to with reference to the smelting of the ores.

We will first endeavor to show this Honorable Court that the District Court was absolutely correct in holding that the Smelting Company was a subsidiary, etc., of the Copper Company.

The following extracts from the findings of fact, as agreed upon by the parties and adopted by the Court below, are all which we think are material to a decision of the question as to whether or not the Smelting Company was a subsidiary, instrumentality, etc., of the Copper Company.

These extracts are submitted with the hope that it will aid the court in the consideration of the matters involved.

"That the Imperial Copper Company was organized in May, 1903, by Messrs. F. M. Murphy, B. P. Cheney,

and associates, for the purpose of acquiring, owning and operating mines, mining properties and smelting plants, and for other purposes in connection therewith, and that Ben Goodrich, A. N. Gage, Henry Kingsley, E. W. Walker and John L. Miller were the incorporators, and constituted the first board of directors of said company; that Ben Goodrich was president, Henry Kingsley was vice-president and A. N. Gage was secretary and treasurer, and were the first officers of the corporation.

The Articles of Incorporation of the Imperial Copper Company amongst other things provide:

'The general nature of the business proposed to be transacted by the corporation is as follows, to-wit:

'To locate, buy, lease, hold, sell, improve, develop and operate mines and mining properties and to pledge, mortgage or otherwise deal in the same, or any leases, options or bonds thereon.

'To quarry, smelt, refine, dress, amalgamate and prepare for market and to market ores, metals and mineral substances of all kinds and to carry on any other operation which may seem conducive to any of the company's objects, to buy, sell, manufacture and deal in minerals, plants, machinery, implements, conveniences, provisions and things capable of being used in connection with mining operations or required by workmen and others employed by the corporation, to buy, construct, lease, sell, convey, maintain, improve, manage, work, control, and superintend any roads, bridges, ways, reservoirs, watercourses, wharves, tramways or rail-

roads, in so far as it may be lawful so to do, to buy, construct, lease, sell, convey, maintain, improve, manage, control and superintend furnaces, smelters, concentrators, mills, crushing works, hydraulic works, factories, warehouses and other conveniences which may seem directly or indirectly conducive to any of the objects of the corporation, and to contribute to, subsidize or otherwise aid or take part in any such operations.' " (Transcript, pp 43-44).

"That on the 6th day of August, 1906, Ben Goodrich, A. N. Gage, Henry Kingsley, J. L. Miller and W. F. Walsh, duly organized under the laws of the Territory of Arizona, the "Southern Arizona Smelting Company," a corporation, bankrupt herein, with an authorized capital stock of 1,500,000 shares. The general nature of the business proposed to be transacted by said corporation was to quarry, mine, dig, buy and otherwise acquire and deal in, sell and otherwise dispose of ores, minerals, metals, and their products direct and incidental, and to dress, mill, reduce, smelt, prepare, refine and otherwise treat ores, minerals, metals and their products, and to construct plants, buildings, machinery and appliances for the carrying on of any of said business; and to locate, buy or otherwise acquire farming lands, desert lands, and to locate and to acquire and develop towns, townsites, water rights, and also to construct, operate and sell works for the producing and furnishing of power, water, gas or electricity; and to operate tramways, street railroads and other methods of conveyance; to carry on merchandise busi-

ness; and to hold, purchase, buy and sell, mortgage and pledge, and otherwise deal in the bonds, mortgages, notes, debentures, shares of capital stock and other securities of any priviate corporation, and to do other certain business, as set forth in the Articles of Incorporation.

The management and control of the business was, by its Articles of Incorporation, vested in and to be conducted by a board of directors of not less than five persons; the above-named incorporates being named as the persons to constitute the first Board of Directors, of whom Ben Goodrich was to be president, Henry Kinsley, vice-president, and A. N. Gage, secretary and treasurer.

That at the time of the organization of said Smelting Company in the latter part of 1906, and during all of the time of the operation of the said Smelting Company as above set forth, the following named persons were directors of the Imperial Copper Company:

E. B. GAGE,

W. F. STAUNTON,

A. N. GAGE,

H. M. ROBINSON,

SELWIN EDDY,

F. M. MURPHY,

V. L. MASON.

and that the following named persons were officers of said corporation:

E. B. GAGE, President,

W. F. STAUNTON, Vice-President and General Manager.

A. N. GAGE, Secretary and Treasurer.

That during practically all of the time said smelter was in operation, to-wit, during the years of 1907, 1908, 1909, and 1910, the following named persons were the directors of said Smelting Company:

E. B. GAGE,

W. F. STAUNTON,

A. N. GAGE,

H. M. ROBINSON,

F. M. MURPHY.

and that the following named persons were the officers of said Smelting Company:

E. B. GAGE, President,

W. F. STAUNTON, Vice-President and General Manager.

A. N. GAGE, Secretary and Treasurer." (Transcript, pp 44-45-46).

"In pursuance of said contract the Imperial Copper Company did erect a smelting plant on the 640 acre

tract above-mentioned, and did convey the same to the Smelting Company, and there-after, and on the..... day of....., 1907, said Smelting Company did cause 7,995 shares of its capital stock to be issued and delivered to the Imperial Copper Company in payment therefor, in accordance with said contract.

"That at said time a total of 8,000 shares of stock were issued, of which 7,995 shares were issued to said Imperial Copper Company, and the remaining five shares had theretofore been issued to qualify the said directors, as heretofore stated, and no other shares of its capital stock at that time were issued or outstanding." (Transcript, p 51).

The contract with reference to the sale of the bullion, between the Smelting Company, American Metals Company and Imperial Copper Company was executed on behalf of the Smelting Company and the Copper Company by the same parties, to-wit, E. B. Gage as President, and A. N. Gage as Secretary of the Smelting Company, and E. B. Gage as President, and A. N. Gage as Secretary of the Copper Company. (Transcript, p 63).

"From the time the Smelting Company commenced operating its smelter in 1908, down to the time it ceased operating, in 1910, the Imperial Copper Company, shipped to it all of the ores which it extracted from its mines, being over five hundred thousand tons, and the same were smelted and reduced to bullion by the Smelting Company. The ores shipped by the Copper Company were received and smelted by the Smelting Company in

accordance with the terms of said contract between the two companies of date August 14, 1906, aforesaid, and the bullion produced by the Smelting Company was by it sold to the American Metals Company, Ltd., in accordance with the terms of the said contract between the said Smelting Company, said American Metals Company and the Imperial Copper Company, of date December 16, 1907, aforesaid." (Transcript, pp 66-67).

The proceeds of the sales (of the bullion) were eventually received by the Copper Company and were by it credited on its books to the account of the Smelting Company. (Transcript p 69).

"The Smelting Company obtained a bill of lading from the Railroad Company for each car of bullion which it so shipped to the American Metals Company, which bill of lading it endorsed and delivered to the Imperial Copper Company with the smelter assay, weight, approximate value, showing the gross value of the bullion, attached thereto; the Imperial Copper Company then drew a draft on the American Metals Company in favor of the Development Company of America for 90% of the gross value, which draft the Copper Company sent to the Development Company of America in New York; and the Copper Company then also drew a draft for like amount on the Development Company of America and deposited the same to its, said Copper Company's credit with the Phoenix National Bank in Arizona.

"The amount of the draft, covering the transaction

was credited by the Copper Company on its books to the Smelting Company, and the Smelting Company made entry on its books of the total monthly amount of such drafts as a charge against the Imperial Copper Company. After the American Metals Company rendered its Account Sales for the lot of bullion so shipped, showing the balance due from it on account of each shipment, the said balance was paid to the Imperial Copper Company in like manner as above set forth, and such balance was likewise credited by it on its books to the account of the Smelting Company and each month the Smelting Company charged the Copper Company with the amounts so received by it. (Transcript, p 71).

"The Smelting Company did not keep any bank account with any bank. The method by which it paid its bills, including labor, materials, coke, fuel and all other charges which it had to pay in the conduct of its business was as follows: It made out vouchers which were O. K.'d by its superintendent, and he sent them to the Imperial Copper Company with a request to pay them and charge the same to the account of the Southern Arizona Smelting Company. The Imperial Copper Company paid the vouchers, and charged the amount against the Smelting Company; and like entries were made on the books of the Smelting Company." (Transcript, p 72).

The payment for ore so smelted and purchased from other persons by the Smelting Company was made by

an order drawn by it upon the Imperial Copper Company and the order was paid by the Imperial Copper Company and was charged against the account of the Smelting Company. (Transcript, p 73).

In conducting its smelting operations, the Smelting Company purchased flux, that is, iron, lime and sulphur, and this expense for flux was a part of the cost of smelting. Coke was also purchased by the Smelting Company from January, 1908, to September 30, 1910, to the value of over $500,000.

"This coke and flux was also paid for by vouchers drawn by the Smelting Company from time to time, on the Imperial Copper Company and the Imperial Copper Company paid the same and charged the amount upon its books against the Smelting Company, in its account against it; the Smelting Company also kept an account thereof on its books." (Transcript, p 73).

"The books of both companies further show that after the smelting plant of the Smelting Company was closed down, the Smelting Company continued to present vouchers for labor, material and other items of like nature, to the Imperial Copper Company, with its request that it pay the same, and that the said Imperial Copper Company did pay the same, so that on the 5th day of July, 1911, when the petition in bankruptcy was filed against the Imperial Copper Company, the Imperial Copper Company, as shown by its books, had paid out for the Smelting Company, a total of $26,-887.71 in excess of all amounts of money which it had

credited to the account of the Smelting Company, so that on said date there remained, according to said books, a balance due from the Smelting Company to the Imperial Copper Company of said sum of $26,887.71." (Transcript, pp 73-74).

"That on the 5th day of July, 1911, certain creditors of the Imperial Copper Company filed with the District Court of the First Judicial District of the Territory of Arizona their petition to have said Imperial Copper Company declared a bankrupt, and thereafter, and on the 25th day of July, said Imperial Copper Company was declared a bankrupt, and thereafter, and on the 12th day of August, 1911, M. P. Freeman was duly elected the Trustee in Bankruptcy of said Imperial Copper Company; that he qualified as such on the 26th day of August, 1911." (Transcript, p 74).

"That on the 17th day of June, 1914, the said M. P. Freeman did resign as Trustee in Bankruptcy of the said Imperial Copper Company, bankrupt, which resignation was accepted by the United States District Court for the State of Arizona, on July 1, 1914, and on said day John H. Martin, the petitioner in the present proceeding, was elected and appointed Trustee in Bankruptcy of the said Imperial Copper Company, bankrupt, to fill the vacancy caused by the resignation of said M. P. Freeman, as such, and on July 2, 1914, said John H. Martin duly qualified as such Trustee in bankruptcy of said Imperial Copper Company, and ever since has been and now is the Trustee in Bankruptcy of said Imperial

Copper Company, Bankrupt." (Transcript, pp 75-76).

That on or about July 10, 1910, some of the creditors of the Copper Company, bankrupt, served written notice on M. P. Freeman, the then trustee in bankruptcy of the bankrupt Copper Company to take possession and control of all the assets of the Smelting Company including slag, etc., as a part of the assets of the Copper Company, bankrupt. (Transcript, p 78).

That on the 20th day of September, 1911, the appraisers appointed in the matter of the Imperial Copper Company, bankrupt, appraised the said smelting plant, machinery and equipment as a part of the assets of the estate of the Copper Company, bankrupt. (Transcript, p 78).

That the appellee herein, Martin, as trustee of said Copper Company, on July 5th, 1914, immediately upon being qualified, went to said flue dust and slag and posted notices thereon stating he had taken possession thereof and placed a keeper in charge of same who remained on the ground until October 31, 1914, when Freeman was elected Trustee in Bankruptcy of the Smelting Company. (Transcript, p 79).

That the Copper Company received all the profits of the Smelting Company and was the owner of all the shares of stock of said company. (Transcript, p 79).

From these facts there was only one possible conclusion to draw upon the question as to whether or not the Smelting Company was a subsidiary and creature of the Copper Company.

With all this overwhelming evidence it was impossible for the Court to come to any other conclusion than that the Smelting Company was nothing more nor less than the creature of the Copper Company, and that the Copper Company simply created and used the Smelting Company as an instrumentality for convenience in the transaction of its business.

The District Court, after considering the findings of fact as agreed upon by the parties and also having before it all the evidence in the case, having correctly held that the Smelting Company was merely a subsidiary, adjunct, agent and instrumentality of the Copper Company, it necessarily follows, as hereinbefore stated that the flue dust and slag involved in this case belong to and are the property of Martin, Trustee of the Copper Company, and, constitute assets of the Copper Company.

This conclusion is supported by a long line of decisions and by the great weight of authority.

In re Muncie Pulp Company, CCA, 139 Fed. 546. Affirmed by the Supreme Court of the United States May 21, 1906, 202 U. S. 621, 50 L ed 1175. (Petition for Writ of Certiorari denied).

Day vs. Postal Tel. Co., 66 Md. 754, 7 Atl. 608.

In re Watertown Paper Co., CCA, 169 Fed 252.

In re Horgan, 97 Fed. 319.

Cole V vs. Price, 22 Wash. 18.

In re Rieger, Capner & Altmark, 157 Fed. 609. "The doctrine of corporate entity is not so sacred that a court

of equity, looking through forms to substance of things, may not in a proper case ignore it to preserve the rights of innocent parties or to circumvent fraud."

Cook on Corporations, 7th Ed, Vol. 3, p 2432: "Where the corporation does business by organizing branch corporations, and the stockholders in the latter are disregarded, and the main corporation pays up the stock and manages it without regard to its corporate character, the property of the branch corporation is subject to the debts of the parent company."

Cook on Corporations, 7th Ed, Vol. 3, Sec. 663, p 2139: "And where a bankrupt practically owns the entire capital stock of the corporation, the Bankruptcy Court will consider the corporation as simply an agent of the partnership and will extend its jurisdiction over its property and determine in the bankruptcy proceedings the respective rights of the creditors of both concerns."

Colonial Trust Co. vs. Montello Brick Works. (CCA 3rd Cir) 172 Fed. 310-313.

The Smelting Company being merely a subsidiary, instrumentality, etc., of the Copper Company, the smelting plant which the Copper Company erected and paid for out of its own funds, and all the property which the Copper Company caused to be held in the name of the Smelting Company, was really the property of the Copper Company and at all times subject to the debts of the Copper Company, and any purchase of the shares of stock of the Smelting Company in March, 1915, by

Leo Goldschmidt, as referred to by counsel for appellant would be subject not only to any debts of the Smelting Company, but also to all the debts of the Copper Company, because all the assets so held in the name of the Smelting Company really belonged to the Copper Company.

The manner in which the Copper Company transacted its business shows conclusively that it held out to the world that it owned all these properties, both mines and smelter. The business was all transacted in the name of the Copper Company. All goods and supplies for mine and smelter were purchased by the Copper Company. All wages of the employees of both mine and smelter were paid by the Copper company. The Southern Arizona Smelting Company was simply a ledger heading on the books of the Imperial Copper Company—a mere department of its business.

The Smelting Company being such subsidiary, instrumentality, etc., of the Copper Company and its property being liable for all the debts of the Copper Company, a purchaser of the shares of stock of the Smelting Company at a foreclosure sale or at any other sale would take such shares subject to all such debts.

Counsel for appellant devote considerable space in their brief to their contention that the Smelting Company was not a subsidiary of the Copper Company, but upon an examination of appellant's specification of errors relied upon, as contained in their brief it will be noted that they do not specify the ruling of the

Court in holding that the Smelting Company was a subsidiary, instrumentality, etc., of the Copper Company, as an error relied upon. As provided by Rule No. 24-1 (b) of this court. Transcript, pp 27-28).

Therefore it would seem that appellant has waived his right to have this court review such ruling of the District Court.

It also argued that because Martin filed a claim against the estate of the Smelting Company that it is thereby admitted that it is not a subsidiary and insrument of the Copper Company. It is sufficient answer to this argument to say that he was simply taking care that if his contention, that the Smelting Company was a subsidiary corporation, was rejected by the courts, then the amount due by it to the Copper Company, according to the books of both would not be waived by his failure to present a claim.

CONSTRUCTION OF SMELTING CONTRACT

It is admitted that all of the ore was delivered to the Smelting Company and treated by it under and by virtue of a contract made between the Copper Company and the Smelting Company on the 14th day of August, 1906, and which appears as Exhibit "A," page 20 of the Record.

That contract, after reciting that the Copper Company was a producer of ores and the owner of a smelter site and that the Smelting Company desired to purchase the smelter site and desired to obtain a contract for the ores of the Copper Company in order to have

a basis upon which to operate the smelter for outside custom ores, provides that the Copper Company shall erect a smelting plant, with all necessary machinery and appliances for the smelting and reduction of ores carrying values in copper and other metals, such plant when completed, to have a capacity of approximately 300 tons daily, and to be complete in all particulars, and erection and construction of such plant and all appurtenances and appliances thereto to be carried on under the supervision of the Smelting Company's general manager or engineer, and that upon the completion of such plant the Copper Company agrees to **sell, convey and transfer by deeds, bills of sale and other instruments of conveyance and transfer,** all of said tract of six hundred and forty acres, constituting the smelter site and townsite, together with all buildings, plant and machinery upon said land and constituting such smelter plant; **and agrees to furnish** the Smelter Company with all ores of every kind produced from the mines of the Copper Company **that may be desired by the Smelting Company, to be smelted and reduced by the Smelting Company.** The term of such contract to be for a term of six months from and after the beginning of operations of said smelter.

The smelting, reduction and marketing of such ores so delivered by the Copper Company to the Smelting Company to be done at the actual cost thereof, plus five per cent interest on the cost of the property and plant of the Smelting Company.

In consideration of these agreements by the Copper Company the Smelting Company agreed to issue and deliver to the Copper Company 7995 shares of the stock of the Smelting Company of the par value of $100 each, the same to be fully paid.

"And the Smelting Company further agrees **to take and reduce** the ores so to be furnished by the Copper Company upon the terms and at the **prices for smelting** hereinbefore set forth."

It is illuminating to read the language in regard to the transfer of the land and plant to the Smelting Company contained in this contract immediately preceding the clause in regard to the smelting of the ore, and compare the words used there with the words used with reference to the ore.

So far as the plant is concerned the contract agrees **to sell, convey and transfer by deeds, bills of sale and other instruments of conveyance and transfer.** The agreement in regard to the ore is **"and agrees to furnish the Smelting Company with all ores of every kind produced from the mines of the Copper Company, that may be desired by the Smelting Company, to be smelted and reduced by the Smelting Company."**

The object of the contract is thus stated in plain terms —to have the ore produced by the Copper Company smelted and reduced by the Smelting Company. There is no word which can be construed into an agreement to sell the ore; no price is fixed, no amount is agreed upon; no character of ore is described as that which the

Smelting Company may desire.

The contract next provides that the smelting, reduction and marketing of such ores so delivered by the Copper Company to be done by the Smelting Company at the actual cost thereof plus five per cent interest on the cost of the property and plant of the Smelting Company. This clause of the contract is clearly the consideration moving from the Copper Company to the Smelting Company and is to be in full payment and satisfaction of all of the smelting, reduction and marketing of the ores.

It would be a remarkable contract of sale which compelled the Smelting Company to take all the product of the mining company; which fixed no quantity to be received; no time of delivery, no place of delivery, and contained no words with reference to the ore which even smack of a transfer of title. The contract laboriously provides that the ore shall be delivered for the purpose of smelting and reduction and such purpose is absolutely hostile to any idea of sale.

And, the Smelting Company is only bound to take such ores from the Copper Company as it may desire. It would seem too clear for argument that if a sale by the Copper Company was contemplated, and a purchase of the ore was effected by the Smelting Company, the contract must have contained some basis upon which its liability to the Copper Company might have been ascertained. The contract contains none. Upon the other hand it contains a full and complete standard by which the value of the services

to be rendered by the Smelting Company to the Copper Company are to be fixed.

Under this contract the ore received by the Smelting Company was to be received for the purpose of being smelted and reduced by the Smelting Company. For whose benefit? Manifestly not its own, for the contract provides that the smelting, marketing and reduction of such ores shall be done by the Smelting Company at the actual cost thereof plus five per cent, to be paid by the Copper Company. If the Copper Company had sold its ore and the Smelting Company had purchased it, why such a provision in the contract? It would be meaningless and without any proper place in such a contract. It will be noted that the smelting, reduction and marketing of such ores so delivered by the Copper Company is to be done by the Smelting Company, and it would seem to follow inevitably that it was to be done by the Smelting Company as the agent and for the benefit of the Copper Company, for that company agreed to pay the actual cost of such servcies and five per cent. It is thus clearly shown that the Copper Company paying the costs of smelting, all materials used by the Smelting Company, no matter from what source they came into its possession, were a part of the costs of smelting the ore. The coke and the flux, being necessarily a part of the process of smelting were necessarily a part of the cost of smelting, and this the Copper Company agreed to pay.

What was the Copper Company to receive under this

contract for its ore? It was to receive the total product of the ore, and, as it had paid the costs of all the ingredients that went into the smelting it was entitled to the flue dust and slag.

The contract thus provides for services by the Smelting Company to be rendered to and compensated for by the Copper Company. It fixes the measure of such compensation clearly. It contains no word of transfer and no declaration that it either sells or agrees to sell any of its ore to the Smelting Company, and the Smelting Company nowhere agrees to buy any ore from the Copper Company; it only agrees to take such ore as it may desire, to be smelted and reduced.

It is elementary law that the intention of the parties is to be gathered from the entire contract, and that where the contract is plain there is no room for construction and the court must enforce the contract as it finds it.

It is earnestly insisted that the contract of December 16, 1907, set out on page 25 of the record, which is a contract between the Smelting Company, the American Metals Company, and the Imperial Copper Company, should be construed in connection with the contract of August 14, 1906, and that together they show an intent to make a sale of its property by the Copper Company. It is material to remember that the contract of August 14, 1906, bound the Smelting Company to market as well as to smelt and reduce the ores. Briefly stated, this latter contract provides for the sale and delivery of all

the copper bullion produced by the Smelting Company to the American Metals Company, at certain prices. The only part which the Copper Company took in this contract was to guarantee its performance by the Smelting Company. Nowhere did it agree to sell its property or transfer the title of its property.

There is much learned discussion of what constituted a bailment and what a sale, and many authorities are cited. It does not require argument or the citation of authority to establish the proposition that property delivered to an agent for a specific purpose, remains the property of the principal until the agent has complied with the contract under which it was delivered. The mere fact that he is authorized to sell the property does not convert him from a bailee into a purchaser, and does not convey any title to him. He receives the proceeds as he receives the property, simply and solely as agent of his principal and for his sole and exclusive use and benefit. He has a lien upon the property or the proceeds for the compensation agreed to be paid him for his services as agent, but that is his only interest in the property, and conveys no title to him.

Counsel for appellant lay much stress upon the case of the Laflin and Rand Powder Company vs. Burkhardt, 97 U. S. 110-120, 24 L ed 973-77, and they stop their citations from the case with the citation of the general principles of a bailment contained on page 110 of the report.

The court in that case, applying the principles there

laid down, said that the case then at bar was quite different from a single mechanical transaction of turning a specific set of logs into boards, or a specific lot of wheat into flour, where there is no room for judgment or discretion.

Discussing the facts of that case, the court said: "No one could lawfully use Dittmar's process for the manufacture of the article of "dualin," except himself. No one could lawfully sell it when manufactured except himself. It was lawful for him to mix these materials and to produce the compound, but it was not lawful for the Powder Company to do so. It is, then, at least a fair argument to say that when materials were sent and delivered to him, to use in a manner which he only was authorized to use, and to produce a result which he alone was authorized to produce, that both the process and the materials, when there was no stipulation to the contrary, should be taken to be his."

The smelting here provided for is a simple mechanical process which any other smelter was authorized to perform and the product of which any smelter was authorized to sell, if its contract gave it such authority. The case is utterly different from the case at bar, and is an authority for the proposition that in the absence of some agreed price for the article alleged to have been sold there could be no sale.

The case of Union Stock-Yards Co. et. al., vs. Western Land and Cattle Co., Ltd., 59 Fed. 49, is an authority

which it appears to us entirely supports the claim that this was a bailment.

The court used this language: "The cause must therefore be determined by the construction to be placed upon the contracts under which possession of the cattle was delivered to Hall. In the solution of that question, we must search for the intention of the parties, as it may be gathered from a reading of the entire instrument, and not from any separate provision of it—the real design of the contracting parties, as disclosed by the whole contract. We should not regard any mere formula of words, nor permit parties to avoid the statute by any cloaking of intent.....The true intent and meaning of the contract does not depend upon 'any name which the parties may have given to the instrument, and not alone on any particular provisions it contains, disconnected from all others, but on the ruling intentions of the parties, gathered from all the language they have used. It is the legal effect of the whole which is to be sought for. The form of the instrument is of little account.' Heryford vs. Davis, 102 U. S. 235, 243 .....In a contract of sale there is this distinguishing test, common to an absolute and to a conditional sale: that there must be an agreement, expressed or implied, **to pay the purchase price.** In a bailment, if a bailment for hire, there must be payment for the use of the thing let or bailed. Heryford vs. Davis, supra. **If service is to be rendered the subject-matter of the bailment,** there must be compensation for

the service, unless the bailment be a mandate." (The bold-face is ours).

The contract under discussion here, containing no promise by the Smelting Company to take the ore at any price and no requirement that it should take all the ore produced by the Copper Company, and the further provision of the contract compensating the Smelting Company for services rendered the subject-matter of the bailment, which is the only agreement for payment by any person, would seem inevitably to stamp the contract as one of bailment and not of sale.

The Case of Chisholm vs. Eagle Ore Sampling, 144 Fed. 670, which the appellants say strongly resembles the case at bar, had this distinguishing feature of difference. The contract involved in that case contained a provision that the settlements for ore shipped should be based upon the ore sampling company's weights and samples, and that the treatment charges for reduction should be regulated by an agreed schedule. There is no doubt in that case that the Smelting Company agreed to take and pay for the ore, basing the price to be paid upon the ascertainment of its contents, and agreed that its charges for reduction should be according to an agreed schedule. The checks received for the ore expressly stated on their face that they were in payment for the ore indicated thereon.

In the present case the property was delivered to the Smelting Company to sell for the benefit of the Copper Company. No price was agreed which the Smelting

Company should pay to the Copper Company for the ore. The course of dealings under these contracts show, it seems to us, beyond question, that the Copper Company was dealing with an instrumentality created by it for the purpose of smelting its ores—simply and solely for that purpose. It agreed that the Smelting Company might sell the ores. The undisputed facts are that upon a shipment of bullion by the Smelting Company the bill of lading was attached to a draft drawn in favor of the Copper Company and turned over to it, and that the proceeds of these drafts were all received by the Copper Company. The Copper Company likewise paid all the expenses of every character of the Smelting Company. The Smelting Company never had any financial life blood. It has been found by the court in this case to be a subsidiary company, created by the Copper Company for its own purposes. Such being the case it would seem futile to argue that it would transfer to an instrumentality created by itself the legal title to its property or give it any chaaracter of possession of its assets other than that necessary to carry out the business for which it was created, to-wit, the smelting and reduction of its ores. The Smelting Company, being without any money of its own, turned over the draft for the product of the ore to the Copper Company, and is nowhere shown to have claimed any other or greater compensation than the cost of smelting plus five per cent, agreed upon by its contract. This five per cent belonged to the Copper Company and it would have been a futile operation to take it from one pocket and pay it to the

Smelting Company and immediately return it to itself as dividends, for, having paid all of the expenses and being the sole owner of all of its stock it was absolutely entitled to all of its assets over and above its expenses of operation.

Again let us consider this contract in the light of what the Copper Company was to give and what it was to receive, and what the Smelting Company was to do and what it was to receive for doing it. The Copper Company was to furnish its ores for the purpose of smelting and reduction. The contract is silent as to where the title of the product was to be, but it must ineviably follow that where property is delivered by a principal to an agent to have certain services rendered to the property and an agreed price is fixed for such services, the product and all of it belongs to the principal who furnished the ore. It is admitted that the Smelting Company has received the cost of smelting and the dividends. There is no provision in the contract that it shall receive all the byproducts of the smelting process or that its compensation shall be increased in any mode beyond the amount fixed by the contract, to-wit, cost and five per cent. To give to this contract the construction placed upon it by appellants would be to read into it a provision that it does not contain, that all of the byproducts of the process of smelting and refining shall be the property of the Smelting Company and its compensation for the services thus rendered the Copper Company be increased by that amount. There can be no doubt that the amount fixed for the services of the

Smelting Company was the only compensation contemplated by the parties, or that the Smelting Company having received that compensation in full, acquired no title to the bullion or to any product arising in the course of smelting and reducing or in any wise. There is no element of a sale in this contract and the mere fact that the Copper Company agreed to guarantee the Smelting Company's performance of its contract with the Metals Company can in no fair sense be held to be a transfer of the title of its property held by the Smelting Company as its agent and for its benefit. The construction of these contracts which holds that the ore and its products remained the property of the Copper Company, and that by its agreement to guarantee the contract of the Smelting Company with the American Metals Company, the Copper Company only agreed to guarantee its action in compliance with its contract as agent and for the benefit of the Copper Company, would seem to meet the full requirements of the law. Each would receive what was its own. Each would receive the compensation fixed by the contract. It needs no citation of authorities to show that mere isolated way bills or statements of account cannot vary the terms of the written contract and are only circumstances which tend to throw light on an obscure contract. They do not authorize either its modification or the addition of new terms to the contract.

In conclusion we say that the contract in question is a contract of bailment, for the reason that it nowhere provides for a sale, nowhere mentions any transfer of title,

nowhere furnishes any standard by which the ore is to be paid for or the amount which is to be delivered under the contract, and gives to the Copper Company no right to compel the Smelting Company to take any ore which it does not desire; that the delivery is shown to be for a certain specific purpose; that a single service was to be rendered to the subject matter of the contract, to-wit, the ore, by the Smelting Company; and that in full payment for all of its services under the contract the Smelting Company was to receive costs and five per cent. It thus clearly shows a bailment with an agreement for the treatment of the ore at a certain price for that treatment together with its marketing. There is no pretense that the Smelting Company rendered any other services under the contract as to the smelting, reduction and marketing of the ores, and there is no denial that it has received the full compensation fixed by its contract for these services. Under these circumstances it would seem difficult to show a change of title in the property or a sale to the Smelting Company.

The following authorities are cited in support of this argument:

Pattrick vs. Colo. Smelter (Colo), 38 Pac. 236: "A contract to deliver a certain quantity of sulphide ores to a smelting company for treatment and to be reduced to a marketable condition for the benefit of the owner of the ores, after compensating the smelting company for labor and expenses of smelting, is not a contract for the sale of ores."

In this case the owners of the mine made and entered into a contract with the Smelting Company wherein and whereby the said owners of the mine did contract to sell and deliver to the Smelting Company 12,000 tons of sulphide ore, the product of a certain mine, and wherein and whereby the Smelting Company agreed to receive said ores and smelt the same and to pay the owners thereof as follows: for the lead on the basis of 25 cents per unit when above 4c in N. Y., and under 4.25, and add or deduct 5c per unit for each advance or fall of ¼c in New York. No pay for lead if 10 per cent or under. Silver, 90 per cent of New York quotation. Smelting charges, $21.50 per ton. Zinc standard, 12 per cent; charge 50c per unit for each per cent above 12 per cent. This was the substance of the contract but the Supreme Court of Colorado held that it was not a contract of sale.

Cyc, Vol. 35, p 30: "Where articles are delivered by one person to another who is to perform labor upon them or manufacture them into other articles for the former, the transaction is a bailment, notwithstanding the articles are to be returned in an altered form."

Cyc, Vol. 25, p. 29: "It depends upon the substance of the agreement, but not upon its form or upon particular expressions used, whether a transaction is a bailment or a sale."

Eaton vs. Lynde, 15 Mass, 242: This was a case where A delivered yarn to B who was to procure it to be made into a cloth for a commission. B delivered

it to C to weave it at an agreed price. It was held that the general property remained in A.

Mitchell vs. Stetson, 61 Mass. 435: Quoting from the opinion: "The cases are numerous in the books in which it has been held that materials delivered to a person for the purpose of being manufactured still continue the property of the original owner, although their nature and character may be essentially changed by the process and their value largely increased. In such cases there is no contract of sale and no act done which divests the property of the original owner. It is merely a contract between principal and agent or employer and employee, the former having the title to the property and the latter a claim for compensation for his services. The manner in which this compensation is to be paid, whether by a right to sell on the part of the agent and to deduct it from the proceeds or by direct payment of it by the principal, is quite immaterial. In either case the title to the property remains unchanged and still continues in the original owner. Were it otherwise it would be difficult to carry on the common transactions of business without an endless confusion in the rights of property."

Foster vs. Pettibone, 7 N. Y. 433, 57 Am. Dec. 530: A contract by which a merchant agrees to deliver to a miller wheat to be ground and the miller agrees to return a specific proportion of flour for such wheat, is a bailment and not a sale and the wheat and also the flour when ground are the property of the merchant.

Quoting from the opinion: "We will examine the contract in detail. In October, 1844, Pettibone agreed to deliver to Foster, at Rochester, 306 bushels of wheat to be ground. These words, unless qualified and controlled by some subsequent provision of the agreement show a bailment for manufacture and not a sale. They show what was to be done with the wheat. If the contract operated as a sale Foster might lawfully sell it again and immediately. But it was to be ground and not sold and the words used by the parties control the power of Foster over the wheat and prevent him from selling it as his own property."

Inglebright vs. Hammond, 19 Ohio 337, 53 Am. Dec. 430: Where one carries wheat to a mill to be ground into flour the contract is not a sale but the property in the flour is in the one depositing the wheat, although it it with his knowledge mingled with wheat belonging to the miller.

Quoting from the opinion: "There was one proposition embraced in this suit which we think was erroneous and that was that if Hammond was to receive flour for the wheat, unless such flour was to be made out of the specific wheat delivered, the jury should consider it a sale of wheat and not a bailment."

Slaughter vs. Green, (Va) 10 Am. Dec. 488: Wheat was delivered to a miller upon an agreement that he should return a given quantity of flour for so many bushels of wheat. It was held that the miller was liable as bailee and was not a purchaser and therefore, if the

wheat be destroyed by accidental fire he will not be held responsible, and this notwithstanding the miller is not bound to return flour made from the identical wheat, but flour of a certain quality.

Quoting from the opinion: "By the terms of this agreement this wheat is to be ground into flour, and when so ground is to be returned to the farmers collectively taken. These circumstances completely negative the idea of a sale or exchange of the wheat, which would carry with it the transmutation of property. The property in the wheat is certainly not conveyed to the millers, when they could not sell the wheat in specie, without violating their contract, which is to grind it into flour; nor even to sell the flour itself without in like manner violating their agreement to return it to the several bailors. The millers in this case have the absolute ownership of nothing, but the excess of the flour which may remain to them after returning the stipulated quantity to the several farmers. This constitutes their profit in the contract, and over this portion of the subject alone have they the absolute right of property. **That right as to the residue, remains in the farmers and has never been surrendered by them.**"

STATUTE OF LIMITATIONS

Counsel for appellant also argue in their brief that the claim of Martin, Trustee of the Copper Company, to the flue dust and slag is barred by the statute of limitations of Arizona.

Appellant does not, in his assignments of error, assign as error the action or ruling of the District Court in overruling or not sustaining his plea of the statute of limitations. (Transcript, p 98-101).

Rule No. 11 of this Court provides that the assignment of errors shall set out separately and particularly each error asserted and intended to be urged; and that errors not assigned according to this rule will be disregarded.

Counsel for appellant do not in their specifications of errors relied upon in their brief, specify the action or ruling of the lower court with reference to the statute of limitations, as one of the errors relied on. Therefore it follows that appellant has waived his plea of the statute of limitations.

However, we most earnestly insist that there is absolutely no merit whatever in such plea.

The appellant in this case, M. P. Freeman, was the Trustee in Bankruptcy of the Imperial Copper Company from August 12, 1911, until June 17, 1914. (Transcript, pp 74-75).

On July 10, 1912, creditors of the Copper Company, bankrupt, made written demand upon Freeman, as such Trustee, to take possession of the property. (Transcript, p 78).

On September 11, 1911, the property was appraised by the appraisers of the Imperial Copper Company and taken into account as a part of the assets of the Copper Company, bankrupt. (Transcript, p 78).

For these reasons we think the decree of the court below should be affirmed. All of which is

Respectfully submitted,

FRANCIS M. HARTMAN,

EDWIN F. JONES,

Attorneys for John H. Martin, Trustee, etc., Appellee.

No. 2824

In the
United States Circuit Court of Appeals
for the Ninth Circuit

In the Matter of SOUTHERN ARIZONA SMELTING COMPANY, a Corporation, Bankrupt.

M. F. FREEMAN, as Trustee in Bankruptcy of SOUTHERN ARIZONA SMELTING COMPANY, a Corporation,

Appellant,

—vs.—

JOHN H. MARTIN, as Trustee in Bankruptcy of IMPERIAL COPPER COMPANY, a Corporation, Bankrupt,

Appellee.

REPLY BRIEF OF APPELLEE TO APPELLANT'S ADDITIONAL BRIEF.

Filed
DEC 9 - 1916
F. D. Monckton,
Clerk.

FRANCIS M. HARTMAN,
EDWIN F. JONES,
Solicitors for Appellee,
Tucson, Arizona.

In the
United States Circuit Court of Appeals
for the Ninth Circuit

In the Matter of SOUTHERN ARIZONA SMELTING COMPANY, a Corporation, Bankrupt.

M. F. FREEMAN, as Trustee in Bankruptcy of SOUTHERN ARIZONA SMELTING COMPANY, a Corporation,

Appellant,

—vs.—

JOHN H. MARTIN, as Trustee in Bankruptcy of IMPERIAL COPPER COMPANY, a Corporation, Bankrupt,

Appellee.

No. 2824

REPLY BRIEF OF APPELLEE TO APPELLANT'S ADDITIONAL BRIEF.

Notwithstanding the fact, as pointed out in our reply to appellant's opening brief, that appellant has not in his opening brief in his specification of errors relied upon, pointed out or specified as an error relied upon the conclusion of law of the District Court that the Smelting Company was a subsidiary, instrumentality and adjunct, etc., of the Copper Company, we have been furnished with an additional brief in the case which is confined to a consideration of the single question of the correctness

of the ruling of the District Court in its Conclusions of Law:

"That the Southern Arizona Smelting Company, a corporation, was a subsidiary of the Imperial Copper Company, a corporation, created and used by the Imperial Copper Company for its convenience in the transaction of its business; that the Imperial Copper Company was the parent corporation of said Southern Arizona Smelting Company and used said Southern Arizona Smelting Company as an adjunct, agent and instrumentality in the transaction of its business."

Upon an examination of appellant's assignment of errors (Tr. pp. 98-101) it appears that appellant has not complied with Rule 11 of this court requiring an assignment of errors to set out separately and particularly each error asserted and intended to be urged.

The only reference to this particular conclusion of law in appellant's assignment of errors is found in paragraph one (1) thereof (Tr, pp. 98-98) as follows:

"I.

"The Court erred in its conclusions of law from the Findings of Fact as made and filed herein, which said conclusions of law, so assigned as erroneous, are as follows:

'That the Southern Arizona Smelting Company, a corporation, was a subsidiary of the Imperial Copper Company, a corporation, created and used by the Imperial Copper Company for its convenience in the trans-

action of its business, that said Imperial Copper Company was the parent corporation of said Southern Arizona Smelting Company and used said Southern Arizona Smelting as an adjunct, agent and instrumentality in the transaction of its business.

'That all of the ores shipped by the Imperial Copper Company to the Southern Arizona Smelting Company, and the title thereto, as well as the title to all of the flue dust and slag dump arising from the smelting of said ores by the Southern Arizona Smelting Company remained in the Imperial Copper Company; that the contract under which said ores were so shipped by the Imperial Copper Company, and smelted by the Southern Arizona Smelting Company, constituted a bailment and nota sale; that said slag dump and flue dust is the property of the estate of the Imperial Copper Company, bankrupt, and John H. Martin, as Trustee in Bankruptcy of said Imperial Copper Company, Bankrupt, is entitled to the possession of said property; and that the estate of said Southern Arizona Smelting Company has no title or right to the said slag dump and flue dust and that said M. P. Freeman, as Trustee of said Southern Arizona Smelting Company, Bankrupt, has no right, title or interest in or to any of said property, and is not entitled to the possession thereof.' "

Appellant has not in his assignment of errors, set out separately and particularly as an error complained of, the conclusion of law of the District Court that the Smelting Company was a subsidiary, agent, instrumentality, adjunct, etc. of the Copper Company, and we

therefore contend that appellant is not entitled to raise the question in this court, especially as appellent does not in his opening brief set out separately and particularly or at all the said conclusion of law of the District Court as an error relied upon, as required by Rule 24 of this court.

However, not waiving any of our rights in this respect, we deem it our duty to our client to reply to appellant's additional brief.

The rule, as deduced from the cases cited and relied on by appellant may be stated: That the rule of distinct corporate existence will be set aside or rather disregarded in two cases: (1) When necessary to circumvent fraud; and (2) When a corporation is so organized and controlled and its affairs are so conducted as to make it merely an instrumentality or adjunct of another corporation.

The cases cited and relied upon as showing that the case at bar should not be regarded as such instrumentality will be considered in the order in which they are cited by the brief.

The first is the case of Pittsburg & Buffalo Co. vs. Duncan, 232 Fed. 584. The facts of that case are that a Receiver of a railroad company which was being administered in the District Court had purchased coal from the appellant, Pittsburgh & Buffalo Co., (an Ohio Corporation), a wholesale coal dealer in Cleveland, Ohio, to the amount of $2182.19. The Cleveland & Pitts-

burgh Coal Co., (an Ohio Corporation), which was also under receivership in the District Court, was a retail coal dealer in Cleveland and was indebted to the Receiver for freight and demurrage in the sum of $1,-453.46, and the Pittsburgh-Buffalo Co., (a Pennsylvania corporation), which was a coal mine owner and operator, was under a receivership in the Pennsylvania courts and was indebted to the Receiver in the sum of $160.96, for repairs to its cars. The receiver claimed the right to offset the indebtedness of the last named companies to him against his indebtedness to the appellant, which right the appellant denied. The court, after stating the stock ownership of the various companies, says:

"Appellant is not under the receivership. It has acted for many years past as sales agent for the two mining companies, which has been its principal business. The books of appellant and the Cleveland & Pittsburgh Company have always been kept separately, and their dealings have not been confined to the material furnished by the Jones interests, although this has constituted a large portion of their business and the principal portion of appellant's business," and decides that the facts fall far short of supporting a conclusion either that the Cleveland & Pittsburg Co (the retail dealer) was in fact appellant's sales agent or that it was so held out by appellant.

Speaking of the effect of the stock ownership and corporate control, the court, after quoting the extract contained in appellant's brief, say: "In the instant case

there is not even complete identity of ownership in fact over the three corporations involved. Their stock is not all owned by the Jones interest, individual stockholders in the different companies are not identical in amount and one of the Jones Brothers has no personal holdings in the Cleveland & Pittsburg Company. **Appellant holds no stock in either of the other corporations.**

In the case at bar the Copper Company owned all of the stock of the Smelting Company, and the latter was finaced wholly with the corporate funds of the former. Its very existence was due to a contract which binds it to do the smelting for the Copper Company at cost and five per cent on the cost of the plant. Its officers are the same, and it has no separate financial existence, its bills being paid by orders on the Copper Company and every dollar of its income being turned over to that company. Ninety-five per cent of its business consisting of work for the Copper Company which it must do at cost, and any profits which it made on outside smelting belonged to the Copper Company by virtue of its owning all the stock.

The facts in that case do not in any sense run parallel with this case and the law declared on such a state of facts can have no application here.

The appellants lay great stress on the case of In Re Watertown Paper Company, 169 Fed. 252: The bankrupt in that case (The Watertown Paper Company) was organized in 1864. Prior to 1886 its entire capital stock

was owned by Hiram Remington and Edward W. Remington and in that year the three daughters of Hiram Remington had 20 shares transferred to each of them. The Pulp Company was organized in 1887 with a capital stock of $20,000, Hiram Remington owning $10,000 and Edward Remington, $9,500 and his wife $500. The court thus states the manner in which the stock in the pulp company was paid for: "The stock of the Pulp Company was paid for by Hiram Remington and Edward Remington in the following manner: They both had credits of considerable sums upon the books of the paper company which by their direction advanced the necessary funds to the Pulp Company and charged the advancements to their accounts." After stating the various changes in the ownership of stock the court say: "It may be broadly stated that during the entire existence of the Pulp Company prior to 1905, when Taylor acquired the shares of the two companies, the ownership of their stock had been in the families of Hiram and Edward Remington and their families. But it also appears that the several stockholders had different interests in the two corporations and that some owned stock in only one corporation.

The affairs of the two companies were closely intermingled. Separate books of account were kept for the two corporations, but the business was conducted from the office of the Paper Company. The Pulp Company had no bank account, all its bills being paid by the Paper Company and charged to its account. All credits were collected by the Paper Company and credited to it, and

a certain proportion of the office expenses were charged to the Pulp Company.

The court after stating the rule of law as to a corporation which was organized as an instrumentality or adjunct, and citing authorities, say: "But the prinicples of these cases are only indirectly applicable here. **Neither the Paper Company nor the Pulp Company own any of the other's shares,** and in no sense can it be said that the Paper Company organized the Pulp Company as a department of its business."

The court then cite the case of In re Muncie Pulp Co., 139 Fed. 546, which was decided by the same court, and, after showing the facts in that case, state the difference between that case and the one they were considering. They say: "The present case is not at all like the Muncie case, nor like any of the other cases cited by appellee..... **The Paper Company did not in any legal sense furnish the money to build the Pulp Company plant. It is true that it actually advanced the funds, but it did it for the account of the Remingtons. It was merely the conduit through which the Remington money passed to meet their obligations. It does not appear that the Paper Company ever had the slightest claim—legal or equitable—to any of the stock of the Pulp Company."**

It is evident from the opinion that the fact that the Paper Company did not use any of its corporate funds to build the plant of the Pulp Company and did not have, in the language of the court, "the slightest claim —legal or equitable" to any of the Pulp Company's

stock, was the foundation of the refusal of the court in the case to hold that the Pulp Company was merely an adjunct of the Paper Company.

The facts in the case now before the court show every fact present in the Watertown case and in addition they disclose the existence of the very facts which that opinion says are controlling, and the absence of which compelled the result reached in the Watertown case.

They show that the entire plant of the Smelting Company was paid for out of the corporate assets of the Copper Company and that all of the stock of the Smelting Company was owned by the Copper Company and they further show that the Smelting Company in the same contract which provided for the erection of the plant bound itself to do the smelting for the Copper Company at cost. If this is not doing the work of an instrumentality of the Copper Company it would be difficult to imagine a state of facts which would show the use of one corporation as an adjunct by another.

It is next insisted that because the appellee or the Copper Company brought suit against the Smelting Company for a balance shown on its books that thereby in some way they are bound to admit that the Smelting Company is not an adjunct of the Copper Company. The appellee was a trustee for the creditors and he had to protect their rights in any aspect of the case. He is not required by any rule of law to rest his case on any one view of his rights. If the Smelting Company is

simply an instrumentality, he has certain rights, and if a separate and distinct corporation he has others, and he may claim both until the courts fix his rights. He would have been negligent not to present his claim as such, and worse than negligent if he failed to call to the Court's attention the relations of the two corporations and to seek its judgment and direction in the collection of the assets of the bankrupt.

If the Smelting Company is merely an adjunct of the Copper Company, it is immaterial what the terms of the contract for the Smelting of ores would import if entered into by parties fully authorized to contract. The whole arrangement would crumble at the touch of the law and the acts done by the Smelting Company would stand forth as the acts and doings of the Copper Company and the nominal assets of the Smelting Company would manifestly be the property of the parent company.

If the Copper Company, by the fiction of the separate corporate existence of the Smelting Company has allowed persons to trade with it as a separate entity, it may be that so far as these creditors are concerned the Copper Company is estopped to deny that the nominal assets of the Smelting Company shall be first used to pay the debts incurred by that company and that in order to obtain the assets of the Smelting Company it must first pay its debts, but this result is reached by way of estoppel and not because the Smelting Company had

any existence as a separate company. The Copper Company's creditors may be bound to subordinate their claims to prior equities of the creditors of the Smelting Company, so far as the nominal assets of that company are concerned, and the appellee may be in no better fix, but such fact does not prevent either the Copper Company or the appellee from establishing the truth as to the relations between the two corporations or oppose an obstacle to the legal consequences which flow from such a state of facts. The transfer of the stock to the mortgages as additional collateral was accepted by them with a full knowledge of all the consequences and with the facts on record as to the relations of the parties and they got no other or higher title than the Copper Company had at the time of the transfer, and there is no dispute that the smelting of the ore which produced the flue dust and slag dump was all done long before any title to the stock was acquired by the pledgees.

These quotations as to the effect of such a holding are to a large extent academic in this case. The question in this case is **solely whether the slag dump and flue dust belong to the estate of the Copper Company.** If there is no legal existence in the Smelting Company because it is simply an adjunct of the Copper Company, then all of its nominal assets belong to that company. If it be a separate and legal corporation and the contract in regard to the erection of the plant of the Smelting Company and the smelting of the ores of the Copper Company is a binding contract, then the contract is a

bailment and the flue dust and slag still belong to the Copper Company.

We also call the Court's attention to the following late decisions:

Decided April 27, 1916, by the Circuit Court of Appeals of the 8th Circuit. Chicago Mill & Lumber Co. vs. Boatman's Bank, 234 Federal (Advance Sheets), page 41, wherein the court said:

"It is true, that, apart from the question of ultra vires, not presently involved, when one corporation owns or controls the entire property of another, and operates its plant and conducts its business as a department of its own business, or as its alter ego, it is responsible for its obligations incurred in so doing. American National Bank vs. National Wall Paper Co., 23 CCA 33, 77 Fed. 85; Westinghouse Electric & Manufacturing Co., vs. Allis Chalmers Co., 100 CCA 408, 176 Fed. 362; Phillips vs. Railroad, 211 Mo. 419, 438, 111 S. W. 109, 17 L. R. A. (N. S.) 1167, 124 Am. St. Rep. 786, 14 Ann. Cas. 742; Union Savings & Trust Co. vs. Krumm (Wash.) 152 Pac. 681.

United States vs. United Shoe Machinery Co., et al, decided June 6, 1916, by the District Court for the Eastern District of Missouri, 234 Federal Reporter (Advance Sheets) page 127, from the opinion in which case we cite the following:

"Whatever may have been the views of the courts in the early days of corporate existence, when there

were but few corporations, and they mostly confined to business of quasi public nature, at this date courts, and especially courts of equity, will look behind the corporate fiction, and if it clearly appears that one corporation is merely a creature of another, the latter holding all of the stock of the former, thereby controlling it as effectively as it does itself, it will be treated as the practical owner of the corporation, when necessary for the purpose of doing justice. In McCaskill vs. United States, 216 U. S. 504, 514, 30 Sup. Ct. 386, 391 (54 L Ed 590), Mr. Justice McKenna, delivering the opinion of the court said:

'Undoubtedly a corporation is, in law, a person or entity distinct from its stockholders and officers. It may have interest distinct from theirs. Their interests, it may be conceived, may be adverse to its interest, and hence has arisen against the presumption that their knowledge is its knowledge the counter presumption that in transactions with it, when their interest is adverse, their knowledge will not be attributed to it. But while this presumption should be enforced to protect the corporation, it should not be carried so far as to enable the corporation to become a means of fraud or a means to evade its responsibilities. A growing tendency is therefore exhibited in the courts to look beyond the corporate form to the purpose of it, and to the officers who are identified with that purpose. Illustrations are given of this in Cook on Corporations, Secs. 663, 664, 727. The Principle was enforced in this court in Simmons Creek

Coal Co. vs. Doran, 142 U. S. 417 (12 Sup. Ct. 239, 35 L. Ed. 1063).'

"The same rule was recognized in Linn & Lane Timber Co. vs. United States, 236 U. S. 574, 35 Sup. Ct. 440, 59 L Ed 725."

"From the allegations in the complaint it is beyond question, that the Maine Company is merely a subsidiary of the New Jersey Company, and that both are under the absolute control, by reason of its stock ownership, of the New Jersey Corporation. The acts of one are the acts of all these corporations; in fact, it may truthfully be said that they are the acts of the United Shoe Machinery Corporation. This being the case, they are properly joined as defendants."

In either aspect of the case, whether the Smelting Company is an instrumentality or a separate corporation, the decree of the court below is correct and it should be affirmed.

Respectfully submitted,

FRANCIS M. HARTMAN,

EDWIN F. JONES,

Solicitors for John H. Martin, Trustee, etc., Appellee.

Tucson, Arizona.

NO. 2824.

In the

United States Circuit Court of Appeals

for the Ninth Circuit

IN THE MATTER OF SOUTHERN ARIZONA SMELTING COMPANY, a corporation, Bankrupt,

M. P. FREEMAN, as Trustee in Bankruptcy of SOUTHERN ARIZONA SMELTING COMPANY, a Corporation, Bankrupt,

Appellant,

—vs—

JOHN H. MARTIN, as Trustee in Bankruptcy of IMPERIAL COPPER COMPANY, a corporation, Bankrupt,

Appellee.

REPLY BRIEF OF APPELLANT TO BRIEF OF APPELLEE.

SELIM M. FRANKLIN,
Solicitor for Appellant.

Filed
OCT 11 1916
F. D. Monckton,

In the

United States Circuit Court of Appeals

for the Ninth Circuit

IN THE MATTER OF SOUTHERN ARIZONA SMELTING COMPANY, a corporation, Bankrupt, M. P. FREEMAN, as Trustee in Bankruptcy of SOUTHERN ARIZONA SMELTING COMPANY, a Corporation, Bankrupt, Appellant, —vs— JOHN H. MARTIN, as Trustee in Bankruptcy of IMPERIAL COPPER COMPANY, a corporation, Bankrupt, Appellee.	NO. 2824.

REPLY BRIEF OF APPELLANT TO BRIEF OF APPELLEE.

The Copper Company did not own the shares of stock of the Smelting Company.

Counsel for appellee, in their main brief, seem to appreciate the fact that if the Copper Company did **not**

own the shares of stock of the Smelting Company, then the Copper Company could not own the assets or property of the Smelting Company.

They assert and argue, however, that the Smelting Company was a subsidiary, instrumentality, agent, and **alter ego** of the Copper Company, **because** it owned all the shares of stock of the Smelting Company; and being such owner, it was the owner of all the property represented by those shares, to-wit, the assets and property of the Smelting Company.

And they further assert that the Copper Company, for said reason, not only was the owner of the flue dust and slag, which are a part of the assets or property of the Smelting Company; but was the owner of all the assets and property of the Smelting Company. And they further assert that as the Copper Company was the owner of all the property of the Smelting Company, Martin, its trustee in bankruptcy, is entitled to recover from Freeman, the trustee in bankruptcy of the Smelting Company, not only the flue dust and slag dump, but all the other property of the Smelting Company, bankrupt, so that the same can be applied to the payment of the general creditors of the Copper Company.

The whole argument is based upon the assumption that the Copper Company was the owner of all the shares of stock of the Smelting Company. And in summarizing the facts as found by the court, they say (page 19 of their brief) that the corut found the following to be a fact, to-wit, we quote the language of their brief:

"That the Copper Company received all the profits of the Smelting Company **and was the owner of all the shares of stock of said company.** (Trancript p. 79)."

Now, we say, the court did **not** find that all the profits of the Smelting Company were recived by the Copper Company; nor did the court find that the Copper Company was the owner of the shares of stock of the Smelting Company, **after** the Copper had transferred the same to the Bankers Trust Company as security for the $2,000,000 issue of bonds.

The finding in the Transcript, referred to by counsel in their brief, does not support their statement.

The finding so referred to, is as follows, we quote for the convenience of the court:

"Between the time that the Smelting Company was organized and down to the time it was adjudicated a bankrupt, on September 29, 1914, it declared only one dividend to its stockholders, to-wit, on the 31st day of October, 1909, the amount of said dividend being the sum of $49,853.62. This dividend was paid to the Imperial Copper Company, **as it appeared at that time as the registered owner on the books of said Smelting Company, as the owner of all the stock of said Smelting Company."**

Finding 24, Transcript of Rec. p. 79

We will briefly review the findings of fact on the question of ownersihp of stock

The Smelting Company did issue all of its issued stock to the Copper Company on or before the 21st

day of December, 1908, and on December 21, 1908, the Copper Company did own all that stock. The court so finds, and there is no question on that point.

But on December 21, 1908, the Copper Company sold, assigned and transferred all those shares of stock to the Bankers Trust Company, and deposited the certificates therefor with the Bankers Trust Company, as a pledge and collateral security, to secure the principal and interest of its bond issue of $2,000,000. This fact, and a copy of the written assignment itself, are set forth in findings 29 and 30, Transcript of Record, pages 82, 83, and 84.

It is a fact, and the court so finds, that the Bankers Trust Company did not cause the certificates for stock so assigned and delivered to it to be transferred upon the books of the Company until the 20th day of June, 1911; but on June 20, 1911, it did cause said shares to be transferred to it on the books of the Company. The finding of fact on this specific point is as follows:

> "Said certificates, so assigned, remained in the exclusive possession of the Bankers Trust Company until on or about June 20, 1911, when the same were by the Bankers Trust Company surrendered for cancellation and reissue, whereupon the same were cancelled and reissued in the name of Bankers Trust Company, as Trustee. And said stock was thereupon transferred and reissued on the books of the said Smelting Company, in name of Bankers Trust Company, as such Trustee, and proper certificates for said stock were issued and delivered to said Bankers Trust Company, as Trustee under said mortagage, and remained in the ex-

clusive possession of the Bankers Trust Company until the same were delivered by it to the Receiver of the Imperial Copper Company, appointed by the District Court of the First Judicial District of the Territory of Arizona, in and for the County of Pima, in a certain foreclosure suit brought by said Bankers Trust Company against the Imperial Copper Company to foreclose the said mortgage and the lien of the collateral security aforesaid, as hereinafter set forth."

Finding 30, Transcript of Rec. pp. 84-85.

Because these certificates were not transferred on the books of the Smelting Company on October 31, 1909, when the Smelting Company declared the one and only dividend that it ever did declare, is the reason why that dividend was paid to the Copper Company. The Copper Company stood on the Smelting Company's books as the registered owner of the shares. And the court so finds in finding 24, Transcript page 79, heretofore quoted.

There is no finding as to what the Copper Company did with the money so received. It may have paid it to the Bankers Trust Company on account of interest on the bonds, or it may have paid other money account of interest. There is no finding whatsoever on this point; and it was immaterial in the case.

In 1911 the Copper Company made default in the payment of interest on the $2,000,000 of bonds issued by it, and on July 3, 1911, the Bankers Trust Company filed its suit before the District Court of the Territory of Arizona against the Copper Company, to foreclose

its lien upon and shares of stock. Finding 31, Transcript p. 84.

In that suit Martin, as Trustee of the Copper Company, Bankrupt, did intervene and did file his answer, wherein he claimed that he, as such trustee, was entitled to said stock of the Southern Arizona Smelting Company, and denied the validity of the lien thereon, asserted by the Bankers Trust Company. Finding 32, Transcript p. 84.

Thereafter, and on December 28, 1914, judgment was rendered in that case, and findings of fact and conclusions of law were made. Finding 33, Transcript p. 86.

And in regard to this judgment and the findings of fact, the lower court in the present case did find as follows:

> "That in the said suit of Bankers Trust Company for the foreclosure of said trust deed and said pledge of stock, aforesaid, said Superior Court did make and file findings of fact **which are binding and conclusive upon John H. Martin, Trustee of Imperial Copper Company,** in the present case, he having been a party to the suit aforesaid."
>
> Finding 35, Transcript, p. 87.

In the findings of fact and decree rendered in the foreclosure suit, so held to be binding and conclusive upon Martin, as trustee of Imperial Copper Company, the said court did find and decree, we will quote from the record in the present case:

"That on or about December 21, 1908, said Imperial Copper Company duly assigned to the Bankers Trust Company all of the capital stock, consisting of 9,000 sahres, of the Southern Arizona Smelting Company, as additional collateral to secure the payment of the principal and interest of the said bonds, aforesaid, and that contemporaneously therewith said Imperial Copper Company did deliver to the Bankers Trust Company proper certificates for all of said shares of stock, duly assigned in blank by the registered holder thereof, in the usual form for stock exchange delivery; that said certificates so assigned, remained in the possession of the Bankers Trust Company until on or about June 20, 1911, when the same were surrendered by it for cancellation and reissue, whereupon the same were cancelled and were reissued to said Bankers Trust Company as Trustee, and said stock was thereupon transferred and reissued on the books of said Southern Arizona Smelting Company to said Bankers Trust Company as Trustee, and proper certificates of stock were issued and delivered to it, as Trustee under the said mortgage, and that at the time of the commencement of the said action to foreclose said mortgage and deed of trust and lien ofaresaid, the said Bankers Trust Company was the duly registered holder of all the stock of said Southern Arizona Smelting Company, except as to qualifying shares for directors, certificates for which the said Bankers Trust Company holds in its custody, duly assigned."

Finding 35, Transcript of Rec. pp. 87-88.

The lower court in the present case then, not only found as a fact that all of the capital stock of the Smelting Company was by the Copper Company assigned as collateral security to the Bankers Trust Company, but further found that this fact, having been adjudicated

by the State Court, was forever conclusive upon Martin.

The lower court, in the present case, does further find as a fact, that on the 28th day of December, in the foreclosure suit aforesaid, the State Court did foreclose the lien and pledge upon said shares of stock, and did direct the same to be sold by its Receiver and Special Master; and that thereafter the same were, by the Receiver and Special Master, duly sold on April 19, 1915, to Leo Goldschmidt; that the sale was confiremd by said State Court, and the certificates were duly assigned on that day to said purchaser. Finding 36, Transcript of Rec. p. 90.

And the lower court in this case did further find, we will quote the exact language of the finding in the record:

> " * * * and neither the Imperial Copper Company, nor the said Bankers Trust Company, nor John H. Martin, as Trustee in Bankruptcy of said Imperial Copper Company, have any right, title or interest in or to the said shares of capital stock of said Southern Arizona Smelting, or any thereof."
>
> Finding 36, Transcript of Rec. p. 90.

In the very face of this finding of fact of the lower court in the present case; in the face of this very decree of foreclosure which the lower court said is conclusive and binding on Martin, as trustee, counsel for appellee in their brief herein say, that the lower court found as a fact that the Copper Company **was** the owner of these shares of stock.

And counsel for appellee base the right of Martin, Trustee, to the assets of the Smelting Company, upon their assertion that the Copper Company was the owner of all the stock of the Smelting Company, when the lower court itself specifically found that it was not such owner.

It is elementary that the foreclosure of a lien or mortgage, forecloses the right and title of the mortgagor or pledgor as the same stood on the day when the mortgage or pledge was given. The foreclosure of the lien or pledge in the suit just mentioned, foreclosed and determined the right and title which the Copper Company had to the stock of the Smelting Company on December 21, 1908, the day that the pledge or lien upon that stock was created. Goldschmidt acquired at the foreclosure sale all the title which the Copper Company had in and to the shares of the Smelting Company, so pledged, as aforesaid, on the 21st day of December, 1908. His ownership of the stock is of all the rights that the Copper Company had on that day.

As the Copper Company had pledged the stock on December 21, 1908, as security for bonds and interest thereon, the only right and title it had thereafter in and to said stock, was the right to redeem; the right to pay the debt and get its stock back. This right of redemption was an asset of the Copper Company. This asset did pass to Martin as its trustee. As its trustee in bankruptcy, he had the right to redeem. But when the decree foreclosing this right was rendered by the State

Court, then all the rights of the Copper Company, or of Martin, as its Trustee, even to redeem, were forever foreclosed.

Counsel for appellee do not assert in their brief that Martin, Trustee, has any right or title of any kind in and to the shares of stock of the Smelting Company. But they do assert that Martin, as Trustee, is entitled to all of the assets and property of the Smelting Company, by virtue of the fact that the Copper Company some eight years ago was the owner of said shares of stock. And they asked the lower court, and this court, to adjudge that they are entitled to all of those assets, of which the flue dust and slag dump are only a part, on the theory that these assets belong to the Copper Company, notwithstanding that the Copper Company did not own the shares of stock of the Smelting Company any time after the same were pledged, but only owned the right to redeem the same from the pledge.

Goldschmidt, the owner and holder of the stock, is not a party to this action. He has had no opportunity to be heard. The creditors of the Smelting Company whose claims have been duly allowed, by the bankruptcy court, amounting in all to $60,000, are, under the theory of appellee, to be deprived of their right to have their debts paid out of these assets; and these creditors are not a party to this suit.

The question in this case is whether or not, under all the facts, the Copper Company was such an owner of the assets of the Smelting Company, that those as-

sets passed to its trustee in bankruptcy to be applied to the payment of its debts. We have shown that one of the most important elements to constitute one company a subsidiary of another, namely, the ownership of the stock of such subsidiary company, is entirely lacking in the present case. The ownership of that stock was not in the Copper Company any time after it was pledged to the Bankers Trust Company. And as the Copper Company did not own the stock after it was so pledged, it cannot be held to own the assets of the Smelting Company, which those shares represent.

The Copper Company did not receive all the profits of the Smelting Company.

Counsel for appellee assert in their brief that the Copper Company received all the profits of the Smelting Company. The lower court made no such finding. The only finding it did make on that point was that one dividend was declared by the Smelting Company on October 31, 1909, and that this dividend was paid to the Imperial Copper Company, as it appeared as the registered owner of all the stock of the Smelting Company. We have supra quoted the words of the finding.

A company might make profits which are not declared as dividends. The statement of counsel for appellee would imply that those profits although not declared as dividends went directly to the Copper Company. But the court made no such finding. What it did find we will now summarize:

The court found, as a fact that all "the bullion pro-

duced by the Smelting Company was **by it** sold to the American Metals Company." (Finding 10, Trans. p. 66).

The American Metals Company rendered to the Smelting Company an account of sale for each lot of bullion it so purchased from the Smelting Company. Finding 11, Trans. p. 69-70).

The Smelting Company endoresed and delivered to the Copper Company the bill of lading for each shipment of bullion; the Copper Company, by drawing drafts on the Development of America in New York, collected and received the purchase price of the bullion so shipped. (Finding 12, Trans. p. 71).

But, we quote from the findings:

> "The amount of the draft, covering the transaction was credited by the Copper Company on its books to the Smelting Company, and the Smelting Company made entry on its books of the total monthly amounts of such drafts as a charge againt the Imperial Copper Company."
>
> Finding 12, Trans. p. 71.

The transaction was purely a banking transaction. The American Metals Company owed the Smelting Company for the bullion so shipped; and the Smelting Company caused the Copper Company to collect this debt by delivering to it the bill of lading and having it draw a draft for the amount.

But when the Copper Company did so collect this debt or draft, it did not keep the money as its own. On the

contrary, it credited the account of the Smelting Company with the amount.

That is exactly what a bank would do. It would credit the account of its depositors with the amount collected on the draft.

"The Smelting Company did not keep any bank account with any bank." Finding 13, Trans. p. 72.

The Copper Company was its banker. It deposited with the Copper Company all of its moneys. But the Copper Company did not claim that the moneys so deposited or collected by it belonged to it. On the contrary, it credited the Smelting Company with the moneys so collected and received.

The learned counsel for appellee in their brief say: "The Copper Company received all the profits of the Smelting Company."

They might as well say that a bank with which a merchant deposits all his moneys, and collects all moneys due such merchant, and credits the same to his account, receives all the profits of such merchant; because part of the moneys so deposited and collected are a part of the profits the merchant makes in his business.

Of coruse, in a certain sense, the bank receives those profits. But **when it credits the same** and the other moneys, to the account of the merchant, it receives the same, not for its own use and benefit, but for the use and benefit of the merchant.

And so in the present case. The Copper Company did receive all moneys due the Smelting Company; but as it credited all those moneys to the credit of the Smelting Company, it did not receive those moneys as moneys belonging to it; but as moneys belonging to the Smelting Company. It considered the money as moneys of the Smelting Company, as any bank would do; and it paid that money out upon the written order or request of the Smelting Company, as any bank would do. The Copper Company acted simply as a banker for the Smelting Company.

The Copper Company having credited the account of the Smelting Company with the moneys so received, the question arises what did the Copper Company do with the money. The answer is to be found in the Findings of Fact. We will quote therefrom:

> "The Smelting Company did not keep any bank account with any bank. The method by which it paid its bills, including labor, materials, coke, fuel and all other charges which it had to pay in the conduct of its business was as follows: It made out vouchers which were O.K.'d by its superintendent, and he sent them to the Imperial Copper Company with a request to pay them and charge the same to account of the Southern Arizona Smelting Company. The Imperial Copper Company paid the vouchers, and charged the amount against the Smelting Company, and entries thereof were made on the books of the Imperial Copper Company, showing the transaction; and like entries were made on the books of the Smelting Company.

The Imperial Copper Company did not pay any amounts for the Smelting Company which it did not charge against the Smelting Company.

The accounts between the two companies were balanced monthly.

The Smelting Company kept its own separate books of account and a set of operating books; and entered all items therein, including all items paid for it by the Imperial Copper Company."

Finding 13, Trans. p. 72.

There was no mingling of funds. There was no merger of identity of the corporate existence of each corporation. Each company kept its own books of account; and transacted its own business as a separate and distinct concern.

The court further finds that on July , 1911, when the petition in bankruptcy was filed against the Copper Company, the books of both the companies show that the Copper Company had paid out for the Smelting Company "a total of $26,887.71 in excess of all amounts of money which it had credited to the account of the Smelting Company, so that on said date there remained, according to said books, a balance due from the Smelting Company to the Imperial Copper Company of the sum of $26,887.71." (Finding 16, Trans. p. 74).

And the corut further finds that on January 23, 1912, the then trustee in bankruptcy of the Copper Company brought suit against the Smelting Company to recover this balance claimed to be due. (Finding 17, Trans. p. 74-75).

We submit that these facts so found, conclusively show that the statement made by counsel for appellee on page 19 of their brief, to-wit, "that the Copper Company received all the profits of the Smelting Company," is not warranted or supported by the Findings of Fact in the record in this case.

The business of the Smelting Company was not conducted in the name of the Copper Company; nor were the goods and supplies for the Smelting Company purchased by the Copper Company. The Smelting Company transacted its business and bought its goods and supplies in its own name.

Counsel for appellee on page 22 of their brief make another important statement that is absolutely contrary to the facts found by the lower court, and of record in this case. They say, we quote from their brief, p. 22:

> "The business was all transacted in the name of the Copper Company. All goods and supplies for the mine and smelter were purchased by the Copper Company."

That the Copper Company conducted its own business of mining and bought all goods and supplies for its mines in its own name, we admit. The Copper Company was engaged in mining ores; that was its business. It owned vast mining properties and it was in the business of mining. We not only admit, but we assert, that the Copper Company did carry on all of its mining business, in its own name, and the Smelting Company had nothing whatsoever to do with it.

But when it comes to the business of buying and smelting ores, which was the business of the Smelting Company, we assert that that business was carried on by the Smelting Company in its own name; that it purchased all its supplies in its own name; and that that business was not carried on by the Copper Company in its own name or otherwise. And we further assert that the foregoing statement of counsel for appellee is contrary to the findings of fact in this case.

As the Findings of Fact speak for themselves, we will refer thereto, to show that therein it is specifically found that the Smelting Company transacted all its business, and bought all its supplies in its own name.

1. The contract wherein the Smelting Company agrees to sell to the American Metals Company all bullion it produced was executed by the Smelting Company in its own name. (Finding 7, Trans. pp. 51-63).

2. The Account Sales of all bullion so sold to American Metals Company was made directly to the Smelting Company in its own name. (Trans. p. 69) And form of "Account Sale" Trans. p. 70.

3. Upon shipping each carload of bullion the Smelting Company obtained a bill of lading from the Railroad Company in its own name, which bill of lading it endorsed and delivered to the Copper Company. (Finding 12, p. 71).

4. The Smelting Company smelted for other persons and corporations, ores shipped to it. For each

shipment it made a smelter return in a form similar to the smelter return set forth on page 68 of the record. (Finding 14, Trans. p. 73).

The smelter return referred to shows on its face: "Southern Arizona Smelting Company. Bought of.. * * * (the name of purchaser being inserted).

5. For each shipment of ore made by the Copper Company to the Smelting Company the Smelting Company issued a smelter return, as per form on page 68 of the record, which says: "Southern Arizona Smelting Company. Bought of Imperial Copper Company."

6. Payment for ore so smelted and purchased from other persons by the Smelting Company was made by an order drawn by it upon the Imperial Copper Company, and this order was paid by the Imperial Copper Company and was charged against the account of the Smelting Company." (Finding 14, Trans. p. 73).

7. "In conducting its smelting operations the Smelting Company purchased flux, that is, iron, lime and sulphur, and this expense for flux was a part of the expense of the smelter operations, the same as labor. Coke was also purchased **by the Smelting Company,** and from January, 1908 to September 30, 1910, coke of the value of over $500,000" (Finding 15, Trans. p. 73) was so purchased.

8. This coke and flux was also paid for by vouchers drawn by the Smelting Company from time to time, on the Imperial Copper Company, and the Imperial Copper Company paid the same and charged the same

upon its books against the Smelting Company, in its account against it; the Smelting Company also kept an account thereof on its books.

Without citing or quoting further from the Findings of Fact, we submit that the record shows that the Smelting Company carried on its business in its own name, and itself sold its bullion in its own name, and itself sold all ores and supplies and coke in its own name. And we further sumbit that there is no finding whatsoever to the effect that the Copper Company in its own name, or even in the name of the Smelting Company, carried on the business of the Smelting Company or bought anything whatsoever for it.

Counsel further assert that all wages of the employees of the smelter were paid by the Copper Company. But they fail to state that the Copper Company only paid those laborers upon an order drawn by the Smelting Company requesting it so to do. And they further fail to state that each order and item so paid by the Copper Company was charged by the Copper Company against the account of the Smelting Company. They hight as well say that a bank paid all of the wages of the employees of the Smelting Company because the Smelting Company drew checks upon the bank requesting it to pay the respective amounts and charge the same to its account.

The mere fact that either the Copper Company, or a bank, paid the wages of laborers, when requested to do by written order of the Smelting Company, and

charged such payments to the account of the Smelting Company, does not justify the statement that either the bank, or the Copper Company, paid such wages; for such payments were made by the bank, or the Copper Company, as the case might be, as agent, and out of the funds of the principal, the Smelting Company.

The Findings of Fact in regard to this payment of wages are as follows:

> "It (the Smelting Company) made out vouchers which were O.K.'d by its superintendent, and he sent them to the Imperial Copper Company **with a request to pay them and charge the same to the account of the Southern Arizona Smelting Company.** The Imperial Copper Company paid the vouchers and charged the amount against the Smelting Company, and entries thereof were made on the books of the Imperial Copper Company showing the transaction; and like entries were made on the books of the Smelting Company.
>
> The Imperial Copper Company did not pay any amounts for the Smelting Company which it did not charge against the Smelting Company."
>
> Finding 13, Trans. p. 72.

We therefore submit that the statement of counsel, to the effect that all the business of the Smelting Company was transacted in the name of the Copper Company; that all goods and supplies for the Smelting Company were purchased by the Copper Company; and that all the wages of the employees of the Smelting Company were paid by the Copper Company; are not supported by the Findings of Fact in the record in this case.

On the contrary, we submit, that the Findings in the record show that the Smelting Company **did** conduct all of its business in its own name; that it purchased all its own supplies in its own name, and itself paid all its own accounts for material and labor.

For the reasons stated on pages 50-51 of our main brief, we do not think the question as to whether the Smelting Company was or was not a subsidiary corporation of the Copper Company is a material question in the present case. But if it is material, then we submit that under the facts as found by the lower corut, the Smelting Company was not a subsidiary of the Copper Company, and that the assets and property of the Smelting Company should be administered upon by its trustee in bankruptcy for the benefit of its creditors, and should not be turned over to Martin, as Trustee in Bankruptcy of the Copper Company, to be applied to the payment of the creditors of that company.

The contract under which the Smelting Company reduced and smelted the ores of Copper Company constituted a sale and not a bailment.

Counsel for appellee in their brief discuss the contract between the Smelting Company and the Copper Company in regard to the smelting ores as though this contract were executory. They utterly ignore what was actually done under the contract. They ignore the interpretation placed upon the contract by the parties. They ignore the fact that the contract has been fully executed.

The question as to the rights of parties under an executory contract is one thing. The rights of the parties after the contract has been executed is another thing.

In an executory written contract, where there is no ambiguity, the court will construe the contract according to the language therein set forth.

But where the contract has been executed; and where, as in this case, new and additional contracts have been made between the parties in pursuance of the executory contract, then the corut will consider what was done. This distinction is clear when the case of Patrick vs. Colo. Smelter, (Colo.) 38 Pac. 236, cited by counsel, is read by the corut.

In that case there was a written contract wherein the defendant agreed to deliver a certain quantity of ore to the plaintiff to be smelted. Defendant refused to deliver the ores and the plaintiff sued for damages for breach of contract. The question in the case was the measure of damages for the breach of an executory contract. The court said, we quote from the decision:

> "The contract was for the treatment of a certain quantity of ore, to be delivered by defendants. The contract was purely executory * * * The question for consideration then, is: In a contract of this kind, what is the proper measure of the plaintiff's damages for the failure of defendants to furnish the ores for treatment? The contract being executory and the ores to be furnisehd not being of any specific grade, quality or value, the damages for non-delivery can have no relation to the quality or value of the undelivered ores, because such

quantity or value could not, without delivery, be determined."

Above quotation is from p. 239, 38 Pac.

Therefrom it will be seen that the foregoing case is not in point.

The case of Chisholm vs. Eagle Ore Sampling Co., 75 C. C. A., 472 Fed. 670-673, cited in our opening brief, was a case requiring the construction of an ambiguous written contract, in regard to the smelting of ores, which had been fully executed by the parties. In that case the court said, in speaking of the written contract:

> "While the words usually employed to indicate an intention to transfer title such as "sell," "purchase," etc., do not appear in the contract under consideration, there is, on the other hand, nothing definitely showing that the claimant intended to retain dominion or control over the delivery to the bankrupt * * * .
>
> But whatever doubts arise from the face of the contract are dispelled by the conduct of the parties under it. It is a familiar rule that, where there is uncertainty as to the true meaning and intent of the contracting parties, the construction which they themselves have put upon it by their voluntary course of practice, when no controversy existed, is always to be given very great, if not controlling, effect."
>
> Chisholm vs. Eagle Ore Sampling Co., 144 Fed. 672.

The court then considers the acts of the parties in carrying out the contract and holds that the entire trans-

action constituted a sale of the ores to the smeler company, and not a bailment.

Counsel for appellee endeavored in their brief to show that the controlling facts in that case are different from the case at bar. And in so doing they make statements of fact which are not supported by the findings in this case.

Counsel say: "In the present case the property was delivered to the Smelting Company to sell for the benefit of the Copper Company." This statement is not supported by the Findings of Fact in the present case.

In the first agreement between the Smelting Company and the Copper Company, of date August 14, 1906, set forth in full Transcript, pages 47-51, the only provision in regard to the delivery and smelting of ores is as follows:

> "and (Copper Company) agrees to furnish the "Smelting Company" with all ores of every kind produced from the mines of the "Copper Company" (whether such mines are now owned or hereafter acquired by the "Copper Company)" that may be desired by the "Smelting Company" to be smelted and reduced by the "Smelting Company." The term of such contract to be a period of six months from and after the date of the beginning of operations of said smelter.
>
> The smelting, reduction and marketing of such ores so delivered by the "Copper Company" to be done by the "Smelting Company" at the actual cost thereof, plus five per cent interest on the cost of the property and plant to the "Smelting Company"
> * * * .

And the "Smelting Company" further agrees to take and reduce the ores so to be furnished by the "Copper Company" upon the terms and at the prices for smelting hereinbefore set forth."

Transcript, p. 49.

After this agreement had been made, and before the Smelting Company commenced operations, another contract was entered into between the Smelting Company, as the first party, the American Metals Company, Ltd., as the second party, and the Copper Company, as the third party. The date of the agreement is December 16, 1907. This agreement is set forth in full in the transcript, pages 52-64.

In this agreement the Smelting Company agrees to sell its entire output of copper ore to the American Metals Company. We will quote from the agreement:

"The party of the first part agrees to sell and hereby does sell at the price and upon the terms hereinafter set forth to the party of the second part, the entire output of copper now or at any time during the existence of this agreement smelted, owned or controlled by it, which it guarantees shall not be less than one million two hundred and fifty (1,250,000) thousand pounds to one million five hundred thousand (1,500,000) pounds monthly, subject to conditions hereinafter set forth, for a period of three (3) years beginning with the first shipment expected to be made in January, 1908, and terminating three (3) years thereafter."

Transcript, pp. 52-53.

In said agreement the Metals Company agrees to purchase the copper or bullion so to be shipped to it by

the Smelting Company and to pay therefor in the manner in said agreement set forth, such payments to be made to the Smelting Company. We will again quote from the record:

> "The party of the second part agrees to purchase and hereby does purchase the said material from the party of the first part upon the terms herein set forth, and agrees to pay to the party of the first part for the same in the manner following:"

The method of payment is provided for in the agreement. Again we quote from the record:

> "The party of the first part shall have the privilege of drawing at sight upon the party of the second part for ninety (90) per cent of the approximate value of such blister copper, less freight and interest and refining charges as above set forth, as shown by bill of lading, satisfactory assay certificates (the assay certificates will be satisfactory if approved by the General Manager or Local Superintendent of the party of the first part), smelter and railroad scale weights attached to the draft, in which event the party of the first part shall allow the party of the second part interest at the rate of six (6) per cen per annum on such advances from the day the drafts are paid until dates when payments would otherwise be due."
>
> Transcript, pp. 54-55.
>
> "The due dates upon which the party of the second part agrees to account and pay for the material to be as follows:
>
> a. For the gold and silver ninety (90) days from date of arrival of the consignment at Nichols Dock or Siding or lighterage free New York.

b. For the Copper sixty (60) days from date of arrival of the consignment at Nichols Dock or Siding, or lighterage free New York."

Transcript, p. 58.

After each carload of copper bullion was shipped by Smelting Company to the American Metals Company another written instrument was executed by the Ameri can Metals Company which showed upon its face that the Metal Company bought this bullion from the Smelting Company. This paper is called an "Account Sale." A form thereof is set forth on page 70 of the transcript. The heading on this written instrument is as follows:

ACCOUNT SALE June , 1910.
FOR THE SOUTHERN ARIZONA SMELTING CO.
TOMBSTONE, ARIZONA

BY THE AMERICAN METAL COMPANY, NEW YORK, N. Y.

Again, the court found as a fact:

"The bullion which resulted from the smelting of these ores, and all other ores smelted by the Smelting Company, was by the Smelting Company shipped and sold to the American Metals Company."

Transcript, p. 69.

The foregoing agreements and documents and findings show that the Copper Company did not deliver its ore to the Smelting Company for the purpose of the Smelting Company selling it for the benefit of the Copper Company, as asserted by counsel. They show that

the ores were delivered to the Copper Company for the purpose of converting the same into copper bullion, and that it was agreed that the Smelting Company should sell this bullion to the American Metals Company and the American Metals Company should pay the Smelting Company therefor.

Again counsel assert in their brief, (p. 32-33): "No price was agreed which the Smelting Company should pay to the Copper Company for the ore."

This statement is contrary to the facts as found by the lower court. The facts as found on this point are as follows, again we quote from the record:

> "The Imperial Copper Company shipped its ore to the Smelting Company in carload lots. Both companies made assay of the ore so shipped. The assay of the Smelting Company controlled unless there was a great variation, when the sample of each company was given to an umpire who assayed the same, and the assay of the umpire was taken as final.
>
> Shipments of ore were made every day by the Copper Company to the Smelting Company, and an assay was made of every lot; a lot comprised one or more cars of ore. Smelter returns upon each lot of ore so sampled and assayed by the Smelting Company were made by it; duly signed, checked by its clerks and given to the Imperial Copper Company. Each of said smelter returns was in the following form, as shown by the smelter return of September 10, as follows, to-wit."
>
> Transcript, p. 67.

Then follows the form of smelter returns which the

Smelting Company executed for each lot of ore it so received. We call particular attention to this form of smelter return, (Trans. p. 68) it being too elaborate to copy into this brief. This smelter return is headed as follows:

SOUTHERN ARIZONA SMELTING COMPANY

Sasco, Arizona, September 8th, 1910.

Bought of IMPERIAL COPPER CO.,

Address Silverbell, Arizona.

Then follows the number of pounds of ore; then follows the assay value of the copper therein. The form of assay return as to this is as follows:

Copper 2.32% 46.4 lbs.@9.917 cts. $4.60

From this is deducted the treatment charge, leaving a net price per ton for this particular lot of ore of $2.40.

Then follows the following:

Gross Proceeds, 1,468,464 tons@$2.40..$3524.31

Then follows:

"Balance Due.....$3524.31

(Trans. p. 69).

This smelter return shows upon its face that the price paid for the copper contained in the ore shipped and accounted for in this assay return was at the rate of 9.917 cts. per pound, and there being 46.4 pounds of copper in each ton, the price paid for each ton was $4.60, less treatment charge, leaving a net price per ton

of $2.40. And then upon the total amount of tons so shipped the total price due from the Smelting Company to the Copper Company is set forth at $3,524.31.

The court further finds as a fact, that this net value of each ore shipment was credited to the account of the Imperial Copper Company. Again we will quote the finding:

> "The net value of each ore shipment, so ascertained and shown on each smelter return, was credited to the account of the Imperial Copper Company on the books of the Smelting Company; and the amount was also entered on the books of the Imperial Copper Company as representing the value of the ore so shipped by the Copper Company to the Smelting Company."
>
> Transcript, p. 69.

The foregoing findings contained in the record, therefore conclusively show that there **was** an agreed price which the Smelting Company should pay to the Copper Company for each particular lot of ore delivered. They show that not only was this price agreed upon, but a balance was struck and entered upon the books of both of the companies as the price and value for the specific lot of ore so shipped by the Copper Company to the Smelting Company.

We therefore say that the statement of counsel in their brief that "no price was agreed which the Smelting Company should pay to the Copper Company for the ore," is contrary to the actual facts as found by the court, and we further say that a price was agreed upon by both the companies for each lot of ore so shipped.

The Copper Company charged the Smelting Company on its books with the net value of each ore shipment; it charged the Smelting Company on its books with every dollar that it paid out for the Smelting Company, at its request. On the other hand, the Copper Company credited the Smelting Company with all the money which the American Metals Company paid upon the purchase of the bullion resulting from the smelting of the ores. We have also shown that the Smelting Company kept the same account in its books; and we have further shown that after the many years of dealings between the two companies, and after all of the moneys due from the Smelting Company to the Copper Company for ores and moneys paid out by it had been so charged, there remained a balance of some twenty-six thousand dollars due from the Smelting Company to the Copper Company, this being the balance as shown by the books of both the companies on July 5, 1911, when the Copper Company was thrown into bankruptcy. (Finding 16, Trans. p. 73-74).

And we submit that the case of Chisholm vs. Eagle Ore Sampling Company, supra, is directly in point and is conclusive that the transactions between the Copper Company and the Smelting Company constituted a sale and not a bailment.

The mortgage or deed of trust executed by the Copper Company to the Bankers Trust Company, to secure the $2,000,000 of bonds was duly recorded June 24, 1904.

Counsel for appellee further say in their brief, (p. 22) that "The manner in which the Copper Company transacted its business shows conclusively that it held out to the world that it owned all these properties, both mines and smelter."

That the Copper Company did own all the mines is conceded in this case. That it owned the shares of stock of the Smelting Company, at one time, is conceded.

But when it executed a mortgage on these mines, and pledged all these shares of stock to secure its issue of $2,000,000 of bonds, its ownership was subject to the lien of that mortgage.

All parties who dealt with the Copper Company, all creditors who lent it credit, had notice of this mortgage lien, for the mortgage was recorded in the office of the County Recorder.

This mortgage covered all the property which the Copper Company had, **or might thereafter acquire.** We will quote the finding of fact on this point:

> "That on or about the 11th day of May, 1904, the Imperial Copper Company duly authorized the issuance and sale of $2,000,000 of first mortgage bonds, and on said day, under proper corporate authority it did execute to the Bankers Trust Company, a corporation, doing business in the State of New York, a deed of trust conveying to it all of the real and personal property which it then owned, or might thereafter acquire, as security for the said bonds, so authorized to be issued, which deed of trust was duly executed and recorded on

June 24, 1904, in the office of the County Recorder, of Pima County."

Finding 2, Trans. p. 44.

What the Copper Company did was to hold itself out ot the world as owning mines, shares of stock and other property, all of which, as well as all property it might thereafter acquire, was subject to the mortgage duly recorded. We have shown that this mortgage has been foreclosed, and that all the property covered thereby, including the shares of stcok of the Smelting Company, was sold.

Men lend credit to raildoad corporations, all of whose property is mortgaged to secure bonds. But this does not give the creditor a right to the mortgaged property, superior to the holders of the mortgage lien.

There is no question of fraud in the present case. There is no finding of fraud.

The question, so far as the Copper Company owning the assets of the Smelting Company is concerned, is simply this: When one corporation owns all the stock of another corporation, and pledges that stock to secure its own debts, are the rights of its general creditors superior to the rights of the pledgee of that stock. Can these general creditors ignore the fact of the pledge; ignore the fact that the pledge has been foreclosd and that a third person has for value purchased the same at forecloseure sale, and recover the assets and property which those shares of stock represent.

OTHER POINTS RAISED BY COUNSEL FOR APPELLEE.

Counsel complain that we did not assign as error the conclusion of law of the lower court to the effect that the Smelting Company was a subsidiary of the Copper Company.

We did assign as error that all the conclusion of law of the lower court were erroneous, and that there should be no doubt as to what conclusion of law we referred to we quoted them in full in the assignment. Tr. p. 98. We think this sufficient.

The lower court in its decree simply decreed that Martin, Trustee, was the owner of the flue dust and slag dump, and that Freeman, Trustee, was not the owner thereof. The court did not ajudge or decree that the Smelting Company was a subsidiary of the Copper Company. See Transcript, pp. 93-95. We have duly assigned that this decree is erroneous and we refer to our assignments of error in the transcript, pages 98-101, as being amply sufficient to raise all the questions in this case.

Again counsel complain that we did not specify as a point of law to be discussed the question of whether or not the Smelting Company was a subsidiary of the Copper Company. We take issue with the gentlemen as to this. We did not use the word "subsidiary"

corporation, but we did say that the point of law to be discussed was this, to-wit, we will quote:

> "As the Copper Company had pledged as security for its bonded indebtedness, all of the shares of the capital stock of the Smelting Company owned by it, and as that pledge has been foreclosed and the shares under such foreclosure had been sold to a third person, to-wit, Leo Goldschmidt, who is now the owner thereof; neither the Copper Company, nor its Trustee in Bankruptcy, is the owner of those shares of stock, nor of the assets of said Smelting Company which these shares represent; but said assets belong to the stockholders of said Smelting Company, to-wit, Leo Goldschmidt, and his assigns, subject to the payment of the debts due by the Smelting Company."

Transcript, p. 28, 29.

Again, in our specification of errors relied on, page 27, of our brief, we specify in paragraph 1 the specific error which appears in the decree in this case, namely:

> "The decree of the court is erroneous in this:
>
> That therein John H. Martin as Trustee in Bankruptcy of the Imperial Copper Company, is adjudged to be the owner and entitled to possession of the flue dust and slag dump in controversy in this action, whereas, the court should have adjudged and decreed that M. P. Freeman, as Trustee in Bankruptcy of the Southern Arizona Smelting Company, was the owner and entitled to the possession thereof."

We also refer to our other specifications of error.

This is a suit in equity. The facts in the case are agreed to by the parties as found by the corut. Under

those facts the court decreed that Martin, Trustee, was the owner of the property in dispute and that Freeman, Trustee, was not entitled thereto. We have assigned and specified and pointed out that this decree is erroneous in that under the facts the court sohuld have decreed that Freeman, Trustee, was the owner and entitled to the property in dispute.

We submit that this decree of the lower court is wrong and should be reversed, and the case should be remanded to the lower court, with directions to enter judgment in favor of M. P. Freeman, Trustee in Bankruptcy of the Southern Arizona Smelting Company, and as set forth in our main brief herein.

Respectfully submitted,

SELIM M. FRANKLIN,

Solicitor for M. P. Freeman,

Trustee, etc., Appellant.

No. 2826

United States

Circuit Court of Appeals

For the Ninth Circuit.

NEVADA NORTHERN RAILWAY COMPANY,
a Corporation,

Plaintiff in Error,

vs.

CLYDE W. HOUSTON,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the District of Nevada.

Filed
JUL 31 1916
F. D. Monckton
Clerk

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

No. 2826

United States

Circuit Court of Appeals

For the Ninth Circuit.

NEVADA NORTHERN RAILWAY COMPANY,
a Corporation,

Plaintiff in Error,

vs.

CLYDE W. HOUSTON,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the District of Nevada.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	Page
Answer	7
Assignment of Errors	75
Bill of Exceptions	19
Certificate of Clerk U. S. District Court to Transcript of Record	87
Citation on Writ of Error	88
Complaint	1
DEPOSITION ON BEHALF OF DEFENDANT:	
HERSHMAN, Dr. FREDERICK	55
Instructions of Court to Jury	63
Instructions to Jury Requested by Defendant	62
Judgment	11
Opinion on Motion to Remand	13
Order Denying Motion for New Trial, of Date April 8th, 1916	73
Petition for Writ of Error	74
Summons	5
Supersedeas and Cost Bond	84
TESTIMONY ON BEHALF OF PLAINTIFF:	
HOUSTON, CLYDE W	22
WALKER, Dr. M. R	27

Index.

Page

TESTIMONY ON BEHALF OF DEFENDANT:

DOUGLAS, M. L. 31

EARLY, Dr. C. E. 56

FULMER, JACOB H. 33

Cross-examination 38

Redirect Examination 49

HOLMQUIST, Dr. W. S. 56

MACLEAN, Dr. DONALD 57

Cross-examination 60

Redirect Examination 60

NEWHAUSER, H. A. 32

Verdict 10

Writ of Error 89

In the Second Judicial District Court of the State of Nevada, in and for the County of Washoe.

CLYDE W. HOUSTON,

Plaintiff,

vs.

NEVADA NORTHERN RAILWAY COMPANY, a Corporation,

Defendant.

Complaint.

The plaintiff, by Messrs. Dixon & Miller, his attorneys, complaining of the defendant, alleges as follows:

I.

That at all the times herein mentioned the defendant was and now is a corporation organized and existing under the laws of the State of Maine, and during all of such time has owned and operated a railroad running from Copper Flat to McGill, both in White Pine County, State of Nevada, and running to Cobre in the County of Elko, State of Nevada.

II.

That prior to the 19th day of March, 1914, the plaintiff was engaged and employed by the defendant as brakeman, at a wage or compensation of $145 per month, and on said 19th day of March, 1914, in the course of his employment was actually engaged as a brakeman on a train numbered 93, consisting of an engine and cars carrying ore from Copper Flat to McGill, in White Pine County, State of Nevada; that at such time when the said ore train numbered 93 was proceeding at a rapid rate from said Copper

Flat to said McGill, by and through the negligence and gross carelessness of the defendant, its officer, agents and other employees, a head-on collision occurred between said ore train and light engine 6 running on the main line of said railroad in the opposite direction from said ore train; [1*] that in order to save his life the plaintiff and each of the other train hands of and in charge of said ore train jumped therefrom immediately before the occurring of said collision; that by reason thereof the plaintiff then and there sustained and suffered divers serious injuries in his back and spinal cord, his neck and his right leg, and was cut, scratched, bruised and injured in divers other parts of his body; that by reason of said injuries, the plaintiff has been unable to work at his regular business as brakeman for the period of 200 days, and has been permanently injured and disabled, so that the plaintiff believes, and therefore avers, that he will be unable to engage in his said occupation as railway brakeman during the remainder of his life, and that he has been so injured and permanently disabled that during the remainder of his life he will be unable to do or perform any manual or other work sufficient to earn his living; that said plaintiff has not sufficient education to engage in any occupation except manual labor. That in consequence of said injuries the plaintiff suffered excruciating pain and agony of body and mind, and his nerves were greatly injured and his nervous system wholly disordered; that the defendant has been obliged to expend large sums of money and to incur

*Page-number appearing at foot of page of original certified Record.

large liabilities in endeavors to have himself cured of said injuries and maladies and the effects thereof.

III.

That the plaintiff is not a resident or a citizen of the State of Nevada, but is a citizen and resident of another State.

IV.

That the defendant, by notice in writing, filed with the Nevada Industrial Commission and posted in conspicuous places where its business was and is carried on, rejected the provisions of "An Act relation to the compensation of injured workmen in the industries of this state and the compensation to their dependents where such injuries resulted in death, creating an Industrial Insurance Commission providing for the creation and disbursement of funds for the compensation and care of workmen injured in the course [2] of employment, and defining and regulating the liability of employers to their employees; and repealing all acts and parts of acts in conflict with this Act," approved March 15, 1913, and being numbered Chapter III of the statutes of the State of Nevada, passed at the 26th Session of the Legislature in the year 1913.

V.

That by reason of said injuries the plaintiff has sustained loss and damage in the sum of Fifty Thousand ($50,000) Dollars.

WHEREFORE, the plaintiff demands judgment against the defendant for said sum of $50,000, to-

gether with his costs of suit.

DIXON & MILLER,
Attorneys for Plaintiff.

State of Utah,
County of Weber,—ss.

Clyde W. Houston, being first duly sworn, deposes and says: That he is the above-named plaintiff; that he has read the foregoing complaint and knows the contents thereof; and that same is true of his own knowledge, except as to matters stated on his information and belief, and as to those matters he believes it to be true.

CYLDE W. HOUSTON.

Subscribed and sworn to before me this 5th day of October, A. D. 1914.

[Seal] OLIN A. KENNEDY,
Notary Public in and for the State of Utah.
My Commission expires July 18, 1917.

[Endorsed]: Hon. Thomas F. Moran. No. 10,586. In the Second Judicial District Court of the State of Nevada in and for the County of Washoe. Clyde W. Houston, Plaintiff, vs. Nevada Northern Railway Company, a Corporation, Defendant. Complaint. Filed Oct. 7, 1914. W. A. Fogg, Clerk. By E. H. Beemer, Deputy Clerk. Dixon & Miller, Rooms 2, 3 and 4, Journal Block, Reno, Nevada, Attorneys for Plaintiff.

No. 1874. U. S. Dist. Court, Dist. Nevada. Filed December 15th, 1914. T. J. Edwards, Clerk. [3]

In the Second Judicial District Court of the State of Nevada, in and for the County of Washoe.

CLYDE W. HOUSTON,

Plaintiff,

vs.

NEVADA NORTHERN RAILWAY COMPANY, a Corporation,

Defendant.

Summons.

The State of Nevada Sends Greeting to said Defendant:

You are hereby summoned to appear within ten days after the service upon you of this Summons if served in said county, or within twenty days if served out of said county but within said judicial district, and in all other cases within forty days (exclusive of the day of service), and defend the above-entitled action. This action is brought to recover a judgment against you for the sum of $50,000 and costs of suit by reason of injuries sustained by the plaintiff as the result of a head-on collision between ore train number 93 and light engine number 6, on or about the 19th day of March, 1914, as more fully described in complaint.

Dated this 7th day of October, A. D. 1914.

[Seal] W. A. FOGG,

Clerk of the Second Judicial District Court of the State of Nevada, in and for Washoe County.

By E. H. Beemer,

Deputy.

DIXON & MILLER,

Attorneys for Plaintiff. [4]

SHERIFF'S RETURN.

Sheriff's Office,
County of White Pine,
State of Nevada.

I hereby certify and return that I received the within Summons on the ninth day of October, A. D. 1914, and that I personally served the same upon the within named defendants, The Nevada Northern Railway Company, through their attorneys, Chandler & Quayle, of Ely, White Pine County, Nevada, by showing the original Summons to them and delivering to them a copy of the same, in Ely, White Pine County, State of Nevada, on the ninth day of October, A. D. 1914, and I further return that I delivered to the said Nevada Northern Railway Company, through their attorneys, Chandler & Quayle, of Ely, White Pine County, State of Nevada, a certified copy of the complaint in said within entitled action, with a copy of the Summons attached, at the same time and place.

Dated this 15 day of October, A. D. 1914.

C. S. CRAIN,
Sheriff of White Pine Co.
By Geo. W. Jackson,
Deputy Sheriff.

Service of the within summons, and copy of complaint on this 9th day of October, 1914, is hereby acknowledged; said service having been made at Ely, White Pine County, Nevada.

NEVADA NORTHERN RAILWAY COMPANY,
By CHANDLER & QUAYLE,
Its Attorneys.

[Endorsed]: Judge Moran. No. 10,586. In the Second Judicial District Court of the State of Nevada, in and for the County of Washoe. Clyde W. Houston, Plaintiff, vs. Nevada Northern Railway Company, a Corporation, Defendant. Summons. Returned and filed October 20, A. D. 1914. W. A. Fogg, Clerk. By F. K. Unsworth, Deputy Clerk. Dixon & Miller, Attorneys for Plaintiff.

No. 1874. U. S. Dist. Court, Dist. Nevada. Filed December 15th, 1914. T. J. Edwards, Clerk. [5]

In the United States District Court for the Ninth Circuit, District of Nevada.

CLYDE W. HOUSTON,

Plaintiff,

vs.

NEVADA NORTHERN RAILWAY COMPANY, (a Corporation),

Defendant.

Answer.

Now comes the above-named defendant and answers plaintiff's complaint on file herein as follows:

Answering paragraph II of said complaint, defendant avers that as to the following portions of said complaint, appearing on page 2 thereof and in paragraph II, to wit: "That by reason of said injuries, the plaintiff has been unable to work at his regular business as brakeman for the period of two hundred days and has been permanently injured and disabled," and "that said plaintiff has not sufficient education to engage in any occupation except manual labor," and "that the defendant (plaintiff?) has

been obliged to expend large sums of money and to incur large liabilities in endeavors to have himself cured of said injuries and maladies and the effects thereof"—defendant has no information or belief upon the subjects sufficient to enable it to answer the same, and placing its denial on that ground denies the same and each portion thereof. Defendant further denies all other matters and things in said paragraph II contained, except those contained in the first seven lines of said paragraph, and except, further, that defendant admits that at the time and place mentioned in said paragraph a head-on collision did occur between the ore train and the engine mentioned therein, as a result of which collision plaintiff suffered slight bruises and scratches, from which he speedily recovered and which did not [6] incapacitate plaintiff from performing his usual and ordinary work for a period of more than thirty days.

Further answering, defendant denies all matters contained in paragraph III of said complaint.

Answering paragraph V, defendant denies that by reason of the pretended injuries by plaintiff, complained of plaintiff has sustained loss or damage in the sum of Fifty Thousand Dollars or in any other sum.

WHEREFORE, defendant prays that plaintiff recover nothing in this action and that defendant have judgment for its costs.

CHANDLER & QUAYLE,
Attorneys for Defendant.

CURTIS H. LINDLEY,
Of Counsel.

State of Nevada,
County of White Pine,—ss.

T. J. Duddleson, being first duly sworn, deposes and says: That he is an officer, to wit, the superintendent of said corporation named in the foregoing answer, and as such officer makes this verification in behalf of said corporation; that he has read the foregoing answer and knows the contents thereof and the same is true of his own knowledge except as to matters which are therein stated on information and belief, and as to those matters that he believes it to be true.

T. J. DUDDLESON.

Subscribed and sworn to before me this 10th day of March, 1915.

[Seal] J. W. BIGGANS,
Notary Public in and for said County and State.

[Endorsed]: No. 1874. In the United States District Court for the Ninth Circuit, District of Nevada. Clyde W. Houston, Plaintiff, vs. Nevada Northern Railway Company (a Corporation), Defendant. Answer. Filed March 15, 1915. T. J. Edwards, Clerk. By H. D. Edwards, Deputy. Chandler & Quayle, Attorneys for Defendant. Ely, Nevada. [7]

In the District Court of the United States, for the District of Nevada.

No. 1874.

CLYDE W. HOUSTON,

vs.

NEVADA NORTHERN RAILWAY CO., a Corporation.

Verdict.

We, the jury in the above-entitled case, find for the plaintiff, and assess the damages in the sum of $12,500.00.

Dated, December 11, 1915.

E. E. WARDIN,
Foreman.

[Endorsed]: No. 1874. U. S. Dist. Court, Dist. of Nevada. Clyde W. Houston vs. Nevada Northern Ry. Co. Verdict. Filed December 11, 1915. T. J. Edwards, Clerk. By H. D. Edwards, Deputy.

In the District Court of the United States, for the District of Nevada.

No. 1874.

CLYDE W. HOUSTON,

Plff.,

vs.

NEVADA NORTHERN RAILWAY CO., a Corporation,

Deft.

Judgment.

This action came on regularly for trial, the said parties appearing and being represented by their attorneys: Messrs. Dixon and Miller, of counsel for the plaintiff; Messrs. Chandler and Quayle, for the defendant.

A jury of twelve persons was regularly impaneled and sworn to try the issue. Witnesses upon the part of plaintiff and defendant were sworn and examined, documentary evidence introduced, and after hearing the evidence, the argument of counsel and the instructions [8] of the Court, the jury retired to consider their verdict and subsequently returned into court with a verdict, signed by the foreman, and being called, answer to their names and say: "We, the jury in the above-entitled case, find for the plaintiff and assess the damages in the sum of $12,500.00."

Wherefore, by reason of the law and the premises, it is ordered, adjudged and decreed, that the plaintiff have and recover of and from the said defendant, the sum of Twelve Thousand Five Hundred ($12,500.00) Dollars, with interest thereon at the rate of seven per cent per annum from the date hereof until paid, together with plaintiff's costs and disbursements incurred in this action, taxed at $201.60.

Dated December 11th, 1915.

Attest: T. J. EDWARDS,
Clerk.

By H. D. Edwards,
Deputy.

[Endorsed]: No. 1874. U. S. District Court, District of Nevada. Clyde W. Houston, Plff., vs. Nevada Northern Railway Co., a Corporation, Deft. Judgment. Filed December 11th, 1915. T. J. Edwards, Clerk. By H. D. Edwards, Deputy.

United States of America,
District of Nevada,—ss.

I, T. J. Edwards, Clerk of the District Court of the United States for the District of Nevada, do hereby certify that the above and foregoing is a full, true and correct copy of the original judgment now on file and of record in my office, and that the above and foregoing constitutes the judgment-roll in this action.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the said court, at my office in Carson City, this the eleventh day of December, A. D. 1915, and in the year of our Independence the 140th.

[Seal] T. J. EDWARDS,
Clerk.
By H. D. Edwards,
Deputy.

(Ten Cent Revenue Stamp Cancelled.)

[Endorsed]: No. 1874. U. S. District Court, District of Nevada. Clyde W. Houston vs. Nevada Northern Railway Co., a Corpn. Judgment-roll. Filed December 11th, 1915. T. J. Edwards, Clerk. By H. D. Edwards, Deputy. [9]

In the District Court of the United States, in and for the District of Nevada.

No. 1874.

CLYDE W. HOUSTON,

Plaintiff,

vs.

NEVADA NORTHERN RAILWAY COMPANY, a Corporation,

Defendant.

Opinion on Motion to Remand.

DIXON & MILLER, for Plaintiff.

CHANDLER & QUAYLE, for Defendant.

FARRINGTON, District Judge:

It is conceded that defendant at the time this action was commenced was a corporation organized under the laws of the State of Maine. The question to be determined is the citizenship of the plaintiff.

In his complaint, filed October 7, 1914, plaintiff avers that he "is not a resident or a citizen of the State of Nevada; but is a citizen and resident of another State." In defendant's petition for removal, verified by its superintendent T. J. Duddleson, filed November 18, 1914, it is stated on information and belief that Houston "at the time of the commencement of this action, was, and has ever since been, and still is a citizen of the State of Nevada."

The recited facts on which this belief is based, are: First: From March 24, 1913, to September 23, 1914, plaintiff "resided with his family at East Ely, Ne-

vada, at which place the said plaintiff during all of said time had his domicile." Second: "On August 10, 1914, said plaintiff * * * registered at said East Ely as an elector to vote at the primary election which was to be held throughout the State of Nevada on September 1st, 1914, for the nomination of candidates for state and county officers." Third: "On September 1, 1914, said plaintiff * * * voted at said primary election in said East Ely."

If these averments were not true, plaintiff should have denied them. He has never done so, consequently they must be accepted as true. [10]

Kentucky vs. Powers, 201 U. S. 1, 33.

The complaint was sworn to in Weber County, Utah, October 5, 1914. In it, plaintiff states that prior to March 19, 1914, he was engaged and employed by defendant, and on that day was injured while he was actually engaged as a brakeman on a railroad train carrying ore from Copper Flat to McGill, in White Pine County, Nevada.

In his affidavit on Motion to Remand, filed on the 23d of the following December, plaintiff states that he was born "and continued to reside in" Kansas, until about October 10, 1910; "while so residing in Kansas he voted at three elections." Where he was born and lived in the State of Kansas does not appear. Neither does he state where or at what character of elections in Kansas he voted. Leaving Kansas, he went to Missouri. He arrived in Nevada about March 21, 1913, and within a few days thereafter was employed by defendant as a brakeman.

I therefore find that plaintiff lived with his fam-

ily in East Ely, Nevada, for about eighteen months, that he registered there in August, 1913, and in the following month voted at the State-wide primaries for the nomination of candidates for State and county officers. If he so voted, he must have satisfied the registry agent that he was then a qualified elector. We must assume that he was at this time an actual resident and citizen of East Ely; otherwise he would not have been entitled to vote at the primary election. It will not be presumed that he voted illegally.

Thompson vs. Ward, 199 Fed. 861.

He says he came to Nevada with the intention of remaining as long as he could obtain and hold satisfactory employment with defendant, or some other railroad company. It is not essential that his intention should have been to live in Nevada permanently; it is sufficient if he intended to reside here for an indefinite time; that is, for a time to which he did not then contemplate an end.

Williamson vs. Osenton, 232 U. S. 619, 624.

Or, as it is stated in United States vs. Chong Sam, 47 Fed. 878, 895: "It is actual residence with the intention of remaining indefinitely, not [11] a purpose of permanent residence, that is essential to the acquisition of a new domicile."

In the case of Succession of Steers, 18 So. 505, it appeared that Steers, whose domicile was in question, came originally from Otsego County, New York, and located at Shreveport, Louisiana. This was in 1870. In 1876 he moved to New Orleans and engaged in business there, living most of each year

but going to Otsego County, New York, every summer. In 1883 he bought a place called "Lakeland," in Otsego County, and fixed it up in a manner indicating he expected to spend his declining years there. Thereafter his wife seems to have regarded Lakeland as the home, but Steers continued to live for the greater part of each year in New Orleans and to do business and vote there. During all of the time, however, he contemplated going back to New York at some future time. Said the Court: "Applying the law to the facts in the record, we are to ascertain whether Schuyler B. Steers acquired a domicile in Louisiana, and, if so, did he abandon it, and acquire a domicile in Otsego County, N. Y. The character of the residence can form no important part in fixing the domicile, unless it is of that character which rebuts the presumption of a fixed intention to remain. It is therefore immaterial whether he lived in a hired house, boarding-house, or his own dwelling. If it was his intention to remain permanently in Louisiana, and his declarations and his act show that he intended to remain for an indefinite period, as a place of present fixed domicile, it will constitute his domicile, though he may have had an idea, at some future time, of returning to the original domicile. * * * When Steers voted in Shreveport he under oath declared he was a citizen of Louisiana. * * *

"Voting may not be conclusive evidence of domicile, as it may be shown that the vote was fraudulently cast. But when there is no question of fraud, and it is the act of the party, supported by his oath, as to the right to vote, it is an important fact, in con-

nection with residence, to fix the intention as to domicile. State vs. Steele, 33 La. Ann. 910; McKowen vs. McGuire, 15 La. Ann. 639.

"It is certain he could not acquire a domicile elsewhere while he [12] continued to reside in New Orleans, keeping up his home, his business, and exercising his political rights. During his residence in New Orleans all the circumstances usually relied upon to establish a domicile occurred his repeated declarations, the payment of personal taxes, the establishment of a place of business, the acquisition of a home, and the exercise of political rights. Mitchell vs. U. S., 21 Wall, 350. Having acquired a domicile in New Orleans, it is presumed to continue until it is shown to have changed. The facts do not show that he acquired a new domicile in Otsego County, N. Y. It is not shown that he resided there with the intention to remain permanently. Id.: Vault Co. vs. Preston, (Ky.) 28 S. W. 658."

Plaintiff further states in his affidavit "that on account of changing employment he never intended to acquire and did not, as he has been advised and believes, ever become a citizen of any other State than the State of Kansas."

If by this plaintiff meant that he never was a citizen of any other State than Kansas, it is strange he did not say so in his complaint, instead of declaring that he "is not a resident or citizen of the State of Nevada; but is a citizen and resident of another State."

It is also a significant circumstance in this connection that in the seventh paragraph of his notice of

motion to remand, it is said that he "was, and now is, a citizen of the State of Kansas, or a citizen of the State of Utah."

The last paragraph of his affidavit is as follows: "That after deponent received the injuries complained of in his complaint, he went to the State of Kansas for treatment and care and remained there a number of months; that plaintiff has now returned to the State of Kansas and has no intention of returning to the State of Nevada to live."

Nowhere in the record does plaintiff declare that at the time this action was commenced his intention was not to return to Nevada, or that he intended to acquire a residence in the State of Kansas, or to reside there permanently, or for any period, definite or indefinite.

Evidently both client and counsel have been somewhat uncertain as to [13] whether to claim citizenship in Kansas or in Utah.

In my judgment plaintiff acquired a residence in Nevada, and became a citizen of Nevada at some time before the action was commenced. Having acquired a domicile in this State, it will continue until another is acquired elsewhere. Once established, this status is presumed to continue until the contrary is shown.

Thompson vs. Ward, 199 Fed. 861, 863.

The mere fact that Houston left the State of Nevada, is in Kansas, and does not now intend to return, cannot affect his status for jurisdictional purposes in this proceeding. It is his citizenship at the time suit was brought which determines the jurisdiction of this court. The fact, if it be a fact, that he

is now an actual, *bona fide* resident and citizen of Kansas, is wholly immaterial, if his residence and citizenship were not transferred to that State until after the cause was removed to this forum. In order to have effected such a transfer, he must have moved his residence to Kansas with the intention of remaining there permanently, or for an indefinite time. There is nothing in the record which shows that he had done either before the action was removed.

The motion to remand will be denied.

[Indorsed]: No. 1974. In the District Court of the United States, in and for the District of Nevada. Clyde W. Houston, Plaintiff, vs. Nevada Northern Railway Company, a Corporation, Defendant. Opinion on Motion to Remand. Filed February 15th, 1915. T. J. Edwards, Clerk. [14]

In the United States District Court for the District of Nevada, Ninth Circuit.

CLYDE W. HOUSTON,

Plaintiff,

vs.

NEVADA NORTHERN RAILWAY COMPANY, a Corporation,

Defendant.

Bill of Exceptions.

BE IT REMEMBERED, that the above-entitled cause came on to be tried before the said court and the Honorable E. S. Farrington, Judge thereof, then and there presiding, on the sixth day of December,

1915, at ten o'clock A. M. of said day, plaintiff appearing by his attorneys, Messrs. Dixon and Miller, and defendant appearing by its attorneys, Messrs. Chandler and Quayle. A jury of twelve men was thereupon drawn, selected and sworn to try said cause and opening statements to the jury were made by counsel for the respective parties. In his opening statement in behalf of defendant Mr. Charles S. Chandler, one of defendant's attorneys, stated in substance that the collision involved in the case occurred by reason of the fact that one of defendant's shop employees took an engine which had been undergoing repairs in defendant's repair-shops out of the shops and on to the main line of defendant's railroad for the purpose of trying it out; that this was done without orders from defendant's train despatcher and without his knowledge and without the knowledge of any other official of defendant company; that, in effect, the shop employee, of his own motion, stole the engine out; that while he was running the engine on defendant's main line of railroad a head-on collision occurred between that engine and one of defendant's ore trains on which plaintiff was employed as a brakeman; that plaintiff seeing the collision impending jumped from the engine of the ore train and sustained [15] some injuries; that while the action of the shop employee in so taking the engine out could not have been anticipated and consequently could not have been prevented by the defendant, nevertheless under the statutes of Nevada the defendant must accept the legal responsibility for any damage actually resulting to the plaintiff on account of this act of the

shop employee; that defendant does not seek to evade this responsibility, but stands ready to pay plaintiff such damage as he has actually sustained as a result of the accident, but it is not willing to pay damages that have not been sustained; that plaintiff claims that he is permanently injured and permanently incapacitated from performing manual labor and seeks to recover damages in the sum of $50,000; while defendant claims and expects to show that plaintiff never was injured beyond a few bruises and scratches and had fully recovered within a few days—at least within thirty days after the accident and is not incapacitated from performing manual labor or the duties of a brakeman; that he is malingering and faking alleged injuries in the hope of deceiving the jury into awarding him heavy damages; that this is the issue to be determined in this case; that defendant is willing to pay for actual injuries, but is not willing to be "humbugged" into paying for injuries that are dissembled and do not exist.

Thereupon evidence was offered and received on the part of the plaintiff and defendant respectively, the taking of such testimony extending over a continuous period of six days and being concluded and the cause argued, the jury instructed and the cause submitted to it on the eleventh day of December, 1915; and on said day the jury rendered its verdict in favor of plaintiff and against the defendant for the sum of $12,500.

Owing to defendant's acknowledgment of legal responsibility for such damages as plaintiff had actually sustained, the evidence was restricted to the

question of the extent and permanency of the injuries received by the plaintiff as a result of the collision. [16]

Testimony of Clyde W. Houston, in His Own Behalf.

PLAINTIFF was called as witness in his own behalf and testified in substance that:

On instructions from the engineer he jumped from the engine of the ore train just before the collision occurred and the first thing he knew after that he found himself out in the country about fifty yards from the tract and from the caboose. He went to the caboose where he met the fireman and a stranger who had been riding on the train, told them he thought the engineer jumped. Shortly afterwards he heard the engineer groaning and told the stranger to get help and get the engineer into the caboose and got a red light and fusee and went back and flagged. On getting back, he set his red light in the middle of the track, and laid down beside the track. Subsequently Brakeman Montgomery came back, took the red light and fusee and went down the track farther and they cut the caboose off the train, pushed it down to where plaintiff was and helped him into the caboose and he was subsequently taken to Avenue F, a little station near East Ely, and from there to the defendant's hospital at East Ely, where he was given a bath and put to bed. He was in the hospital about a week, was examined once by Dr. Early, the defendant's chief surgeon, and the only treatment he received was some medicine rubbed on his back by Dr. Early. His physical condition immediately after

(Testimony of Clyde W. Houston.)

the collision was that he was excited and nervous and he didn't know how he did feel. When he got to the hospital he was very nervous, his knees were swollen, his face was scratched, his neck and back were swollen and he had considerable pain in his back and side. About a week after leaving the hospital he was taken to Salt Lake where an X-ray picture was taken of his back and he was examined by Dr. Snyder. At this period his back hurt him all the time and he was in a very nervous condition; was unable to walk without the aid of a cane because of his right leg; his eyes bothered him and he could read nothing but the headlines. He then returned to Ely where he was examined by Dr. Holmquist, who gave him some medicine and advised him to go to a nerve specialist at San Francisco and to a lower climate. Shortly afterwards [17] he went to the home of his father and mother at Ellis, Kansas, where he received osteopathic and chiropractic treatment for three months, under which his condition improved. He then returned to East Ely, Nevada, and worked one shift of eight hours on one of defendant's passenger trains, but didn't work longer than one day because he wasn't able to on account of his nervousness; the jar and the jolting and getting on and off the train affected him so he couldn't stand it. After returning to East Ely he got worse all the time; had pains in his stomach and back; his legs cramped and went to sleep; he was unable to read any length of time and was nervous and all unstrung.

(Testimony of Clyde W. Houston.)

Since the injury he has been unable to eat anything except eggs, toast, soup, mush and stuff like that; eating heartier food made the pains in his stomach lots worse; he has never had a movement of the bowels without physic since he was injured. Has done no work since the injury except the eight hours above mentioned and has not earned any money since then. The physicians in Ellis, Kansas, advised him not to work for a long time. If he is riding on a train and they come to a quick stop, or anything like that, it makes him awfully nervous; in standing around the streets where there are automobiles, it makes him very nervous. He has suffered from pains in his stomach and from headaches up to this time. The stomach pains are there all the time and the headaches occur once or twice a week, sometimes once in two weeks. They are very, very severe and occur when he eats anything that doesn't agree with him. Before the collision occurred his physical condition was good. He worked all the time and never had any sickness. He weighed one hundred fifty-five pounds and now weighs one hundred twenty-four pounds.

He walked with extreme difficulty and pain while at the hospital. This difficulty and pain in walking increased from the time he left the hospital until he went to Ellis, Kansas, but improved there to such an extent that he was barely able to walk around without a cane. He suffered continuous pain in walking while at Ellis. His [18] difficulty in walking increased again after he worked the one shift in

(Testimony of Clyde W. Houston.)

August, 1914, but within a week or ten days recovered to the condition that existed at the time he left Ellis and has ever since remained about the same. He has not been able to walk fast at all since then. He gets tired very easily, doesn't know how far he can walk but has at least eight or ten times since the injury walked from his house in East Ely to the Northern Hotel in Ely, traversing some hills, in about thirty-five or forty minutes time, although he never timed it. (It was shown by other testimony that this distance was about a mile and a half.) This walk was difficult for him; he walked slowly and with pain. By walking five or six blocks and waiting not over an hour he could have taken a suburban train. He has walked from his home to Ely and then walked back probably seven or eight times.

Just before this action was commenced he went to Ogden, Utah, some time in September, 1914, and was there when he verified the complaint. He remained in Ogden about two months. He stayed with his aunt in Ogden and while there walked to the business center of the town sometimes once a day and sometimes not for two or three days. He has walked it twice in one day. Sometimes he rode but he walked oftener than he rode. It was not easy for him to walk this distance. He walked with difficulty and sometimes his legs would cramp. When this happened he would sometimes stop and rest. He was not able to walk without limping while in Ogden. He was sick most of the time he was in Ogden.

(Testimony of Clyde W. Houston.)

Eating heavy food invariably makes him sick. He has pains in his stomach all the time but they get very much worse when he eats anything heavy; the more severe pains last from eight to twenty-four hours. They commence immediately after eating heavy food—sometimes while he is eating it. This applies to steak—sometimes to oysters and sometimes not. Intoxicating liquors have the same effect. He quit drinking them more than a year ago for that reason. He has been put to bed for two or three days just from drinking one glass of whiskey. He feels sick the next day after eating a steak—belches [19] up gas on his lungs and has bearing down pains in his stomach. He has eaten heavy stuff in Ogden and it always made him sick—at least within three hours. The pains always commenced and would last from ten to twenty-four hours—sometimes a week. Since the accident he has been made sick by eating heavy stuff, such sickness lasting a week at least a hundred times. Doesn't mean that he has been in bed that long, that many times—means he has those spells from eating heavy food. He cannot state for sure whether there have been as many as a hundred occasions when such more severe pains and sickness lasted a week. It isn't always heavy stuff that makes him sick—sometimes anything he eats has that effect. Sometimes it comes when he doesn't eat at all. There are times when he eats heavy stuff and doesn't have the sickness—not those severe pains. Any time he eats heavy food it hurts him. The pain always comes

(Testimony of Clyde W. Houston.)

after eating heavy stuff. Didn't understand the question when he said that sometimes he ate heavy food and it didn't affect him. He has no appetite or desire for heavy food. It is rather repulsive to him.

Intoxicating liquors form gas on his stomach and puts him in such a condition that he cannot eat anything. (Tr. 120.)

He did not make any effort to secure work while in Ogden. (Tr. 36.) He did not tell Senator Jake Fulmer in Ogden in October, 1914, that he had applied for or expected to get a job in a canning factory in Ogden, or that he had put in an application for a job as switchman with a railroad company there. (Tr. 116.)

Testimony of Dr. M. R. Walker, for Plaintiff.

Dr. M. R. WALKER, a medical witness on the part of the plaintiff, testified in substance that:

He examined the plaintiff about the middle of November, 1915. He made a physical examination consisting solely of examining his back, including his spine by palpation, and examining his abdominal region by palpation and percussion. He found very tender spots and tender nerves along the spine, but otherwise found nothing wrong with the spine. He found certain muscles of the back that were evidently very painful, were tender. He had to rely very largely on the patient to determine whether any spot was tender, although he tried to be on [20] his guard against fraud. The physical ex-

amination of the abdomen was not conclusive. He formed the idea (from an involuntary contraction of the muscles found on deep pressure) that the abdominal organs were not in a normal condition but was not satisfied with that examination alone. That was all he did in the way of a physical examination. He then made an X-ray examination of the stomach and intestines (pp. 73–77). On the X-ray examination he found dilation and a ptosis of the stomach and also of the caecum (p. 56). He diagnosed the condition as nervous exhaustion, the result of a severe shock (the accident in question) stated by Houston in giving his history (p. 55). The whole condition of the man was that of a neurasthenic, which means simply a nervous exhaustion and general debility. There was a general lack of nervous tone, "the man was nervous, an inability for any long-continued position or line of endeavor or thought and more or less of a tremor" (p. 56). The mental symptoms of neurasthenia are usually a nervous exhaustion, inability to pursue a given line of thought or to carry out a given plan; it is generally a weakness and loss of power; there may be in some individuals apparent or real deterioration of the mind, although that is not so common as merely an exhaustion and an inability to carry out the given line of thought or action (p. 57). The ptosis of the abdominal organs was a result of the nervous condition, the exhaustion of the nerves causing the ligaments supporting the abdominal organs to lose their tone and to become elongated, like a piece of rubber

(Testimony of Dr. M. R. Walker.)

that has lost its elasticity, and so allowing the organs to drop down (pp. 60–62). It is the usual thing for stomach and colon displacements to result from a derangement of the nervous system (p. 77). There is always some nervous disturbance preceding such displacements unless in the case which is exceedingly rare, of an injury so great as to tear the organs out of place, which brings it into another class (p. 85). Aside from Houston's statements there is no means of estimating how long the ptosis has existed (p. 77). Witness is acquainted to a limited extent with the physical efforts to be put forth by railroad brakemen; **[21]** has observed a good many brakemen. From the condition in which he finds Mr. Houston at this time, and from the knowledge he has of the physical effort necessary to be made by railway brakemen, he would not expect that Mr. Houston would be able to continue or resume his work as a railway brakeman. Witness testified that from his examination of Mr. Houston and from his nervous condition, he would expect the prospects of his ultimate recovery to be a very doubtful question; that in these cases it is possible that by appropriate care and treatment a man may regain considerable of his strength, but his observation and experience has been that the majority of them never recover but a small degree of their original strength.

The defendant called as witnesses, among others, the conductor, rear brakeman and the fireman of the ore train on which plaintiff was riding just prior to

(Testimony of Dr. M. R. Walker.)

the collision, who testified as to the occurrences immediately after the collision, both at the scene of the accident and at the hospital, their testimony being to the effect that after the collision the plaintiff found the engineer (who had jumped from the opposite side of the engine—from the one from which plaintiff jumped) and then walked up to the front of the ore train (which consisted of twenty-one ore cars each about thirty-two feet in length besides the engine and caboose), told the conductor that he had found the engineer, walked back to the rear of the train with the conductor, assisted in carrying the engineer into the caboose, then walked back up the track, probably about a quarter of a mile to flag and remain there until he was relieved by brakeman Montgomery and then walked back to the caboose at the rear of the ore train, and rode in the cupola of the caboose when the passenger train backed up and hauled the caboose to Avenue F station; that the hospital ambulance was at Avenue F. to take them to the hospital, but plaintiff protested against going to the hospital, saying he was not hurt and would go home; that he was prevailed upon to go to the hospital, at which place the conductor testified, plaintiff again protested that he was not hurt beyond being shaken up and stiff and would go home, but he was **[22]** not permitted to do so, that plaintiff further protested against being assisted to take a bath and was left to go to the bathroom alone to take his own bath.

(Testimony of Dr. M. R. Walker.)

The conductor also testified that when plaintiff went with him from the engine to the rear of the train to find the engineer, they "travelled along pretty fast to get back there" (p. 148); that plaintiff appeared to have no difficulty in walking at the wreck "only that he did limp a little" (p. 149). He further testified that at the hospital a day or two after the accident plaintiff stated to him that, "Bill (the engineer) and I has got it fixed up what we are going to do, we are going to make the company pay for this."

Testimony of M. L. Douglas, for Defendant.

M. L. DOUGLAS, in defendant's employ as a brakeman and a witness in behalf of defendant, testified that he saw plaintiff at the hospital the next day after the collision and that plaintiff said that the engineer was the only one that was hurt severely; that he (plaintiff) wanted to go home and didn't know what they were keeping him over there for; that Houston said he "was a little sore and stiff from getting off the engine, but otherwise he didn't think there was anything wrong with him" (p. 143); that "the boys all had it on the Company and he was going to make it strong on his part and they would have to come across with him" (p. 142). This witness also testified to having met plaintiff on the occasion of plaintiff's return from Ellis, Kansas, and that plaintiff did not limp or have any apparent difficulty in walking, and said he was feeling "pretty good"; that he met plaintiff on a subsequent occa-

(Testimony of M. L. Douglas.)

sion on the train between Ely and East Ely and they talked about when plaintiff might be able to go to work and plaintiff said "they had to pay him, it wasn't a job that he wanted, it was money that he was after; that he could get a job any time." Plaintiff did not limp on this occasion. This was before plaintiff worked the shift on the passenger train. On all of the many occasions the witness saw plaintiff after the collision, with the exception of the two mentioned, the plaintiff limped. Witness had a talk with plaintiff (about two weeks after plaintiff worked the shift on the passenger train) as to the reason plaintiff **[23]** did not continue to work, and plaintiff said "it wasn't a job he wanted, that they would have to pay him or words to that effect."

Testimony of H. A. Newhauser, for Defendant.

H. A. NEWHAUSER, one of defendant's brakemen, a witness in behalf of defendant, testified that he had seen the plaintiff since the collision when plaintiff walked lame and had seen him when he didn't walk lame; that on one occasion he saw the plaintiff come out of a grocery store with a twelve or fifteen pound paper sack in each hand and carry them up the hill toward plaintiff's home in East Ely, which was five or six blocks away, and he noticed that plaintiff didn't walk lame; that in the latter part of the summer of 1914 and after plaintiff had worked the shift on the passenger train witness had a talk with plaintiff during the course of which plaintiff said "that he wanted to go to work and he

(Testimony of H. A. Newhauser.)

didn't want to go to work, and he says, 'I don't believe I will go to work,' he says, 'I believe I will make them pay me the money,' he says, 'that is what I want'; and he says, 'Really,' he says, 'I don't want to go to work.' Now that is just how it came up; he says, 'I really don't want to go to work, but,' he says, 'I want the money; it is coming to me and I am going after it'; he says, 'I would really rather have the money than the job.' ''

Testimony of Jacob H. Fulmer, for Defendant.

JACOB H. FULMER, a witness in behalf of defendant, testified in substance as follows:

I am employed as a conductor for the Nevada Northern Railway Company; have known the plaintiff about three years; I met him in Ogden, Utah, on October 17, 1914. I was standing on the corner of 25th St. and Capital Avenue, and I saw him in company with two other gentlemen come around the corner; it was about seven-thirty in the evening, and I thought I recognized Houston, and I followed them to a political meeting, where they stopped, and I stopped and talked with him. They were walking at a good rapid rate of speed when they came around the corner. It was about a block, perhaps a little more, south, from where they passed me to where I overtook them. The blocks run eight blocks to the mile. I spoke to Mr. Houston and he introduced me to his two cousins; he said they were his cousins, and **[24]** he and I walked around town most of the evening, up until twelve o'clock that night. He did

(Testimony of Jacob H. Fulmer.)

not seem to have any difficulty in walking when I first saw him come around the corner with his two cousins, and had no difficulty in walking that I could notice during the rest of the evening. We had, I should judge, half a dozen or more drinks of whiskey together that evening. I don't recall sitting down that evening at all. Houston during that time did not complain of fatigue, to me. We walked around at a natural rate of speed, about the same as anyone would walk around town. We walked west on Capital Avenue, or west from the corner of Twenty-fifth Street and Capital Avenue; we was all over town, practically; different places; when we felt as though we wanted a drink we would drop in and take a drink. We separated at the corner of Twenty-fifth Street, and Houston and his two cousins went home. The two cousins were with us only a little of the time. Houston and I were walking around most of the time until we met them just prior to leaving for home. Houston told me he lived on Thirty-fifth St. and said he was in the habit of walking home, that he was in the habit of walking back and forth. That would be ten blocks from where I left him that night. The blocks run eight to the mile. The next day I met Houston about a block east of Twenty-fifth Street; he was walking west and I had been walking east on the opposite side of the street, and when I saw him, I turned and walked about west until he came up to the corner of Twenty-fifth Street. I observed him walking before we met; he was walking just as natural as he ever walked,

(Testimony of Jacob H. Fulmer.)

and was walking along at a fair rate of speed. This was perhaps about nine-thirty of the 18th. After meeting him we walked around awhile, and finally we met Al Graves, whom we knew, from Ely, he had worked there. We walked around about the same as we had the day previous, drank some and ate some. We ate, I should judge, about ten o'clock; we both ate a dozen raw oysters each. I should judge they would be eastern oysters, they were good-sized, about two inches in diameter each. Besides the oysters we had a bottle of beer and some crackers. After meeting Graves we went to a **[25]** place about halfway between Twenty-fifth Street and the depot. We were looking for a place to get a drink, that is, a saloon, and a place to sit down, and Al said he knew of a place we could got into, and he took us down to this hotel. I think it is a small hotel; and we went up a flight of stairs and through the office, and went down a flight of stairs into the basement, into the bar-room, or the saloon. I should judge we were there about two hours. We were drinking most of the time and talking. There was quite a number of railroad men in there besides us. After we came out of there I think Mr. Graves left us, and Mr. Houston went to my hotel with me, and I got my grip, and he accompanied me to the Bamberger depot, and I left for Salt Lake. We did not take the street-cars at all. It was about three blocks from where we met Mr. Graves to the hotel where we had the drinks. My hotel is down at the depot, which is over half a mile, pretty close to three-

(Testimony of Jacob H. Fulmer.)

quarters of a mile, I should judge, from Washington Ave. The Bamberger depot is about two blocks from my hotel. I think we met Mr. Graves about twelve o'clock and Mr. Houston and I had been continuously together since I had met him in the morning and had been on our feet all of the time with the exception of when we were eating our oysters. I did not notice that Houston walked lame that day. He did not walk with any apparent difficulty, other than he kind of carried his neck a little stiff the same as always. He always carried his neck to one side as long as I remember knowing him. He did not complain to me of any pain or any weakness or of any fatigue, and I did not notice that he had any difficulty in going up and down the steps I have spoken of. If he had had any difficulty I think I would have noticed it. I knew that Mr. Houston at that time had commenced suit against the Nevada Northern Railway Company. I saw him again on October 20th, after returning from Salt Lake. I met him in front of the Falstaff Restaurant on Washington Avenue about ten-thirty in the morning. On the previous occasion, the 18th, Houston and I had a half dozen or more drinks of whiskey together. He did not drink anything else that I saw except that he drank beer **[26]** with his oysters. On the 20th, after meeting him about ten-thirty, we were together until about six o'clock in the evening. He had lunch with me and we were walking around the town the rest of the time except that we sat down at the corner of Twenty-fifth Street and Washington

(Testimony of Jacob H. Fulmer.)

Avenue for about *a* hour. For lunch we each ate a fair-sized T-bone steak. Houston seemed to clean up all of his steak. Both of us ate heartily. Besides the steak we had combination salad between us and bread and butter and potatoes. We were drinking more or less all the time that day and perhaps had more than a half a dozen drinks. We were walking around town, just strolling around. We walked west on Washington Avenue I should judge half or three-quarters of a mile and returned. Houston did not become intoxicated that day that I could tell or on either of the other two occasions.

On one of these three occasions I had a conversation with him with respect to his seeking employment. He told me that he had been promised a job with the canning factory in Ogden and also said that he had been down to the Southern Pacific shops to secure work but that they were full handed and very little work going on. He said that he had applied for a position as switchman at the S. P. yards.

I saw plaintiff Houston in East Ely, Nevada, after he had returned from Ellis, Kansas and prior to the occasions of which I have been speaking. I saw him several times. He was at my house several different times. He walked with a kind of a side motion. His neck seemed to be stiff. He did not walk that way all of the time. I remember particular occasions on which he did not walk that way, but I cannot furnish dates. I have noticed him on the street when he did not seem to be walking with the side

(Testimony of Jacob H. Fulmer.)

motion. I saw him on the occasion when he worked the shift on the passenger train after his return from Ellis, Kansas. I rode up on the train to Ely, the train on which Houston was working. I observed him at that time. He walked with a kind of a side motion; he was carrying a lantern; his head was kind of—neck kind of turned to one side. I saw him get on at East Ely and off at Ely. He did not have any apparent difficulty [27] in doing so. The way he held his head did not differ from the way he held his head before the accident.

I saw the plaintiff, Houston, intoxicated subsequent to the time of the accident, in the Antler Saloon in East Ely, Nevada. It was shortly after he returned from Kansas. When I saw him in Ogden he told me he felt very good. The most extensive conversation we had in Ogden was on the 20th when we were seated on the curb at Twenty-fifth Street. He told me that he would have settled with the company had they given him a thousand dollars and a lifetime job, also that he had been examined in Ogden by two different doctors and that he was to go to Reno to be examined by a specialist on request of his attorney. He said he felt good and was sleeping all right.

Cross-examination.

I saw Mr. Houston in Ogden on October 17th. I saw Mr. Houston the first day in Ogden, on October 17th. That was Saturday. I got to Ogden in the evening of the same day and remained there until the next afternoon at two-thirty, then went to Salt Lake.

(Testimony of Jacob H. Fulmer.)

I stayed in Salt Lake until the morning of the 20th. I did not see Mr. Houston on the 19th, and the 18th was Sunday. After the 20th I did not see him again until I saw him in Reno. I left Ogden I think on the 21st and returned to Ely. During this time I still held my job with the defendant, but was laying off. I worked for the defendant afterwards. I am acquainted with Rule "G" of the Nevada Northern Railway Company. That is to prevent any man from drinking while on duty. The rule states that a man shall not drink while on or off duty. I violated that rule during those four days, but was not discharged in consequence. Under Rule "G" you are subject to discharge for a violation of it. I saw Houston on the 17th about seven-thirty in the evening. I have no memorandum of the time, but remember going down on the 17th and seeing him in the evening of the same day. I informed Mr. Cannon (defendant's general manager) of these conversations with Houston, I should judge, in about ten days, a week or ten days after I returned from Ogden. It is not a fact that the Nevada Northern [28] Railway Company paid my expenses to Ogden on that trip. I saw Mr. Houston about seven-thirty —an hour and a half or two hours after I got to town. I stopped at a hotel right across the street from the depot—the S. P. depot. I went immediately to my hotel, went to my room and washed, went to dine and walked up town. I met Mr. Houston at the corner of Twenty-fifth Street and Washington Avenue—that is one of the main streets and corners of the town

(Testimony of Jacob H. Fulmer.)

—and spent that evening until about twelve o'clock with Mr. Houston. I saw him the next morning, I should judge, between nine and ten o'clock. I got up Sunday morning about seven-thirty. I had not had my breakfast before coming up town. I had heard that Mr. Houston was in Ogden before I went there. I heard that from his brother's wife, who lived at my place. I saw Mr. Houston that evening coming around the corner of Twenty-fifth Street and followed him and overtook him after he stopped, and from there we walked around town. We were in several saloons. We went to a saloon, I should judge, probably within fifteen or twenty minutes after I met him. We walked in and took a drink but we did not stay in the saloon very long. We took one drink in that saloon—I bought it. After we went out of that saloon we walked around town and I should judge in about half an hour went to another saloon and had a drink there—I bought it. I am not sure where we went from that saloon, but I think we went to the picture show that evening. I am not sure that we went to the picture show right after we went out of the second saloon. We went into still another saloon. We were in several saloons that evening, I should think half a dozen. We had a drink in every saloon we went to. I bought the drinks. We went into saloons later in the evening—went to one prior to his going home and had a drink there—I bought it. We were in two or three saloons after the picture show was out. I should judge the picture show was out about nine-thirty. I don't know as a matter of

(Testimony of Jacob H. Fulmer.)

fact that the saloons at that time in Ogden closed at nine o'clock in the evening. I bought all of the drinks. I noticed Mr. Houston before I overtook him where he stopped, and also [29] afterwards, and also after the show. I noticed all evening how he was walking and acting. He had no difficulty in his walking to my notice. I noticed none whatever. If there had been a difficulty in his walking I would have noticed it. I was observing him. We separated at the corner of Twenty-fifth Street and Washington Avenue about midnight. I went to bed at my hotel. Got up next morning about seven-thirty and went up town before breakfast, and met Mr. Houston, I should judge, about ten o'clock. I first saw him east of Twenty-fifth Street on Washington Avenue, and we breakfasted together. I don't know whether Mr. Houston had had his breakfast. He ate with me at my expense. We had a bottle of beer. I bought it. That is the time we had the oysters. We each ordered a dozen oysters and we ate them and some crackers, and had a bottle of beer between us. It is not the fact that we ordered a half dozen oysters apiece and that Houston ate three of his. I am positive of that—just as positive as I am of any of the rest of my testimony. We walked around a whole lot on the evening of the 17th. I should judge we walked a mile perhaps. We were strolling around. I would not say we walked over a mile. We were in the picture show about an hour, I should judge. That would leave four hours for strolling around with little visits in the saloons between time. Dur-

(Testimony of Jacob H. Fulmer.)

ing this time Houston made no complaint to me of fatigue. During this time we did not sit down except the time in the picture show. He did not make any complaint of fatigue to anyone else that I heard. After we got our oysters Sunday morning we walked around town, I should judge, about an hour and we met Al Graves. We probably covered in that space of time a half a mile or more. I should say more than half a mile. It may have been more than a mile. I don't think we walked to exceed a mile. We had drinks that morning, in the hotel that Al Graves took us to, or the saloon that he took us to. That was between twelve and two o'clock. We had half a dozen drinks perhaps. Houston took at least six drinks of whiskey that day there, fair-sized drinks of whiskey, regular whiskey glasses. I should judge, about two fingers of whiskey [30] in the glass. I bought part of them. There were three or four other railroad men in the crowd who bought also. We were in the hotel, or saloon, I should judge, about two hours. Spent that time talking and drinking, then I went to my hotel and got my grip, about two o'clock, and went to Salt Lake. I returned from Salt Lake Monday morning about seven o'clock. I saw Houston that day in front of the Falstaff Restaurant, on Monday morning. We were together that day until about six o'clock in the evening. We had lunch. I invited him and paid for the lunch. We had half a dozen or more drinks that day. I would be safe in saying a half a dozen. We went perhaps into eight or ten different saloons. Did not

(Testimony of Jacob H. Fulmer.)

buy a drink in every place. Houston drank every time I did. I paid for them. I made a mistake as to the day. If that was Monday, the 19th, I did not see him on the 19th, it was Tuesday. I returned from Salt Lake on Tuesday, the 20th, not on Monday, the 19th. That was the day we had dinner and I saw him up until six o'clock in the evening, then I went to my hotel. Went to the picture show that evening. I parted from Mr. Houston at the corner of Twenty-fifth Street and Washington Avenue about six o'clock, and I did not see him any more that night nor the next day. I returned to Ely the next day. I had quite a conversation with Mr. Houston about his injuries and condition. Had such a conversation several times. The most extensive conversation we had was the day we were seated on the curb, the day I returned from Salt Lake. We sat there about an hour. We talked about other things too, a general visit, and during that conversation he said he would take a thousand dollars and a life job and settle. I did not ask him any questions as to what he would settle for, and did not in that conversation advise him to settle. I recall one instance when I so advised him. This was after he returned from Kansas to East Ely. He told me he was going down to settle and I told him I thought it was a very good idea—that was all I said. He never ate oysters in Ogden more than once. During this conversation on the curb he told me he had been promised a job. I don't think I asked him, I [31] think he voluntarily told me. All he said to me was not purely voluntary,

(Testimony of Jacob H. Fulmer.)

I asked him questions. He told me that he had been trying to get a job on the Southern Pacific as switchman. I don't recall saying anything in reply to that statement. He told me also that he had been promised a job in a canning factory in Ogden. He did not say what kind and did not tell me what wages he was going to get, or what kind of work he was going to do. I did not ask him any questions about it, only that he told me that he had been promised a job in a canning factory. I did not have any curiosity to know what wages he was going to get or what kind of work he was going to do. Houston always had a little side motion in his walk. I have known him almost three years. I noticed this side motion when I first saw him. I mean he always had it from the time I knew him. I first met him in East Ely at my home and I noticed this side motion then when he was walking around the house. He came to the house quite frequently. On the first occasion I noticed him walking across the room with this side motion and have noticed it ever since, almost every time I saw him. I have seen him carrying a cane in East Ely after the accident. He walked just as naturally in Ogden as he ever did. I don't recall ever seeing him walking without the side motion. On the occasion when I saw him on the train, when he was attempting to work on the passenger train, I got on the train at East Ely. Houston was acting as brakeman. When I first saw him he was standing on the steps. I role with him up to Ely, at Murry Street, and got off. He got off first. I was

(Testimony of Jacob H. Fulmer.)

on the rear end of the rear car when I saw him get off. He got off the rear end of the rear car. I was on the rear platform. He did not have any difficulty at all in getting down that I noticed. He had his hand on the railing. I saw him drunk in the Antler Saloon after he returned from Kansas in 1914. I could not state the month, but it was in the fall or late summer, before he went to Ogden. It may have been the fore part of October. It was right after dinner. I saw him lying on the pool-table in the Antler Saloon. I went in to get some tobacco. I had not seen him [32] before that day. He was drunk. I know he was because I saw him get up off the pool-table. I am satisfied he was drunk. He appeared to be drunk. That was my judgment. I did not help him get up. I was in the saloon there perhaps five minutes.

In Ogden he told me that he felt very good. That was in all conversations I had with him relating to the particular incident, and he told me he was sleeping all right. He said that more than once. I think I asked him on two different occasions how he slept. I also asked him how he was feeling. I was sent to Ogden by Mr. Cannon partially for the purpose of seeing what he was doing. It is not a fact that since this case was set for trial on November 23d that I have been in Reno on the same mission. I saw Mr. Houston in Reno about ten days ago, found him in a restaurant. Another witness for the defendant told me where he was and I went down there. I went and talked with him and invited him to have a drink.

(Testimony of Jacob H. Fulmer.)

I insisted on his taking a drink and he refused. He did not drink. He walked with me about two blocks. I don't recall asking him to go any further.

I talked to Mr. Cannon about this matter perhaps three or four days before I left Ely to go to Ogden on the 17th day of October, 1914, and I had a conversation with him after I returned and I reported to him what occurred. I think I told him about this drinking. I was not discharged by the Rule "G." I made a report to Mr. Cannon after I returned from Salt Lake; I guess there was more than one sheet of paper in that report—three or four sheets. I signed it and handed it to Mr. Cannon.

At this point the examination proceeds as follows:

Mr. MILLER.—Mr. Chandler, I want that report.

Mr. CHANDLER.—Well, the report I think is a sworn statement, and the original is not here, but we have a copy of it. We have a copy and will stipulate that it be considered the same as the original. I presume the witness in saying that he made a report refers to the sworn statement. [33]

WITNESS.—Yes.

Mr. DIXON.—He has testified that he made a written report.

Mr. CHANDLER.—This is not in the form of a written report; it is in the form of a statement.

WITNESS.—I made no written report myself.

Mr. MILLER.—(Q.) That statement contained the result of your trip to Ogden, didn't it?

A. Yes, sir.

(Testimony of Jacob H. Fulmer.)

Mr. MILLER.—While you are finding that I will proceed.

Mr. CHANDLER.—I think it is right here. (Hands paper to Mr. Miller.)

Mr. MILLER.—(Q.) Have you looked this statement over, Mr. Fullmer, since you came here to Carson City? A. No, sir.

Q. When did you see it last?

A. Is that the signed statement?

Q. This is a signed statement, "East Ely, Nevada, November 5, 1914. Statement made by Mr. J. H. Fullmer," and your name in pencil, with the word "Brakeman" under it; two typewritten pages. This appears to be a carbon copy; do you want to see if it is the one?

A. I would like to see that. (The paper is handed to the witness.)

WITNESS.—That is not my signature.

Q. That is not your signature? A. No, sir.

Q. Do you recognize the two pages to be the statement you refer to, Mr. Fullmer?

A. I think that is the statment.

Q. Where was that statement typewritten?

A. It was typewritten in Mr. Cannon's office.

Q. Was he present? A. He was.

Q. Who propounded the questions?

A. Mr. Cannon.

Q. Now, when did you last see this statement, or the matter contained in it?

A. I haven't seen that statement since I signed it, until now.

(Testimony of Jacob H. Fulmer.)

Q. Have you had a conversation with anybody about it?

A. I have talked with the attorneys for the defense.

Q. Since you came to Carson? A. Yes, some.

Q. I will ask you if you recognize this question and answer. (Reads:)

"Mr. CANNON.—Will you please state what your conversation was? [34]

"Mr. FULLMER.—I asked Mr. Houston how he felt; he said he felt very good; I asked him where he lived; he said on Thirty-fifth Street; I asked him if he had been working any; he said he had not, that he was unable to secure any work, that he had a promise of a job with a canning factory."

Do you recognize and recall that statement?

A. I do, yes.

Q. And is that correct? A. Yes, sir.

Q. And the matters and things stated in this answer, all occurred, did they? A. Yes, sir.

The testimony of the witness, reduced to narrative form, then continues as follows:

I spent I should judge about thirty or thirty-five dollars on the trip to Ogden and Salt Lake. I rode on a pass from East Ely to Cobre, and I rode on half-rate from Cobre to Ogden, and I paid my way from Ogden to Salt Lake, rode on half-fare from Ogden back to Cobre and on a pass from Cobre back to Ely. I can't say how much of that money I spent for drinks. Mr. Smoot and I spent some money together

(Testimony of Jacob H. Fulmer.)

in Salt Lake—probably ten or twelve dollars. I think I spent ten or twelve dollars for drinks on the entire trip, probably seven or eight dollars in Ogden. The dozen raw oysters cost me six bits a piece. I paid for Mr. Houston. The T-bone steaks cost me eighty cents apiece. I was recompensed for this expense. I was not paid for the time I spent in Ogden on that trip. I was laying off at the time I went to Ogden. That time was deducted from my monthly pay. I did not receive any other money, just my expenses. I don't think I received the whole of my expenses on that trip. I want to qualify my previous statement. That previous statement was whether or not I was furnished the money to go to Ogden, and I said no; but I was paid, my expenses were refunded to me after I returned from Odgen. I don't suppose that it was paid until after the next pay-day, after I made that statement. I should judge I bought twelve or fifteen, perhaps more, drinks for Clyde Houston in Ogden. It is not the fact that I deliberately [35] tried to get Houston drunk there. I was a brakeman at the time I went to Salt Lake and am a conductor now.

Redirect Examination.

My home in East Ely is in a small hotel, sixteen-room hotel, I have there. That is the house I refer to as being my home that Mr. Houston visited the first time I saw him. My promotion from brakeman to conductor was in the regular line of promotion. I am the twelfth oldest man working in the train ser-

(Testimony of Jacob H. Fulmer.)

vice of the Nevada Northern. My promotion was made about June, of 1915.

The following then took place:

Mr. CHANDLER.—I think, if the Court please, in view of the apparent importance that has been attached to this statement, that we shall offer it in evidence as a part of the redirect examination of Mr. Fullmer.

Mr. MILLER.—If the Court please, I object for this reason, not that it amounts to anything, but they already have the same testimony in by this witness, and if your Honor reads the statement, you will find the same questions; and not only that, but it is a copy, and not an identified copy.

Mr. CHANDLER.—It is the paper referred to in the cross-examination of Mr. Houston.

The COURT.—It seems to me that would be a statement they might introduce as against you, but can you introduce it in your own behalf?

Mr. CHANDLER.—I think we may in order to eliminate in the minds of the jury any impression that counsel may have left that this statement is prejudicial to the witness' statement.

The COURT.—Well, I would assume if he had found anything in that document that was to his advantage, he would have offered it; he would have been at liberty to offer it under the rule, but whether you can offer it is a serious question in my mind.

Mr. CHANDLER.—I will state frankly to the Court that I don't know whether the rules of evidence would permit it or not, but it seems to me to be a mat-

(Testimony of Jacob H. Fulmer.)

ter of justice that it should go in.

The COURT.—I don't think so. [36]

Mr. CHANDLER.—We note an exception to the Court's ruling.

The COURT.—You may have your exception.

Mr. CHANDLER.—That is all, Mr. Fulmer.

The statement referred to and which was excluded from evidence is in words and figures as follows:

"East Ely, Nevada, November 5th, 1914.

STATEMENT MADE BY MR. J. H. FULMER.

Mr. CANNON.—Mr. Fulmer, you were in Ogden recently, what date was it?

Mr. FULMER.—I was in Ogden on the 17th day of October, 1914.

Mr. CANNON.—You were there several days, weren't you?

Mr. FULMER.—Yes, sir.

Mr. CANNON.—While you were there, did you see C. W. Houston, who formerly was a brakeman for this company.

Mr. FULMER.—Yes, sir.

Mr. CANNON.—On what date did you first see him?

Mr. FULMER.—I saw him on the 17th of October.

Mr. CANNON.—Did he see you on the same date?

Mr. FULMER.—Yes, sir.

Mr. CANNON.—I wish you would state just what transpired.

Mr. FULMER.—I arrived in Ogden about 5:40 in the evening, on October 17th. About seven o'clock

(Testimony of Jacob H. Fulmer.)

in the evening, I was standing on the corner of Twenty-fifth St. and Washington Ave. Mr. Houston, in company with two other gentlemen, passed me. After they had passed, I thought I recognized Houston, and I followed them, a short distance behind, for about three blocks on Twenty-fifth St. towards the depot.

Mr. CANNON.—Did you catch up with him, and have a conversation with him?

Mr. FULMER.—They stopped and I caught up with them.

Mr. CANNON.—Will you please state what your conversation was?

Mr. FULMER.—I asked Mr. Houston how he felt; he said he felt very good. I asked him where he lived; he said out on Thirty-fifth St. I asked him if he had been working any; he said he had not; that he [37] was unable to secure any work, but he had the promise of a job with a canning factory.

Mr. CANNON.—Did he tell you what kind of work he was going to do for the canning factory?

Mr. FULMER.—No, sir; he did not. He just said that he had a promise of a job with a canning factory.

Mr. CANNON.—Did he indicate by his method or manner of walking, or otherwise, that he was not in first-class physical condition?

Mr. FULMER.—He apparently was as well as I ever saw him. He walked just as well as I ever saw him walk.

Mr. CANNON.—Did he have anything to say to

(Testimony of Jacob H. Fulmer.)

you in regard to the suit which he has instituted against this Company?

Mr. FULMER.—Not on that day.

Mr. CANNON.—Then you saw him subsequently?

Mr. FULMER.—I did.

Mr. CANNON.—Did he then have anything to say?

Mr. FULMER.—I saw him on the following day, the 18th. Was with him all the forenoon and up until 2:45 o'clock in the afternoon. He seemed to be in good spirits and good health.

Mr. CANNON.—Did he mention anything about the suit?

Mr. FULMER.—Not on that day.

Mr. CANNON.—That is, not on the 18th?

Mr. FULMER.—No, sir.

Mr. CANNON.—Did he have anything to say about the suit on the following day, or on any subsequent day?

Mr. FULMER.—He did, yes; on the 20th.

Mr. CANNON.—Will you please state what he said.

Mr. FULMER.—He and I were walking around that day and finally sat down on the curb, facing Twenty-fifth St, and Washington Ave. He told me that if the Nevada Northern Railway Company had given him $1,000.00 and a lifelong job, he would have settled with them.

Mr. CANNON.—Your conversation with him, and your association with him would not convince you that he was incapacitated for taking care [38]

(Testimony of Jacob H. Fulmer.)

of himself, without a lifetime job from anybody?

Mr. FULMER.—No, sir.

Mr. CANNON.—You stated that he lived beyond Thirty-fifth St. on Washington Ave.—had he been in the habit of riding in on the street-cars, or walking in?

Mr. FULMER.—He was in the habit of walking in, so he told me.

Mr. CANNON.—The distance is some three miles, is it not?

Mr. FULMER.—Now, I would not say for sure as to the exact distance—I think the blocks run eight to the mile, and it is much more than a mile.

Mr. CANNON.—He preferred to walk than ride?

Mr. FULMER.—Yes, sir. He said he had been in the habit of walking back and forth.

Mr. CANNON.—Did he say anything to you about being under a doctor's care?

Mr. FULMER.—He said he had been examined by two physicians in Ogden.

Mr. CANNON.—Did he mention the names of those physicians?

Mr. FULMER.—He did.

Mr. CANNON.—Will you kindly give the names?

Mr. FULMER.—One of them is Dr. R. E. Worrell, Eccles Bldg., Ogden; as to the other one, he said Dr. Robinson. There are two doctors of this name, one A. A. Robinson, office in Lewis Bldg., and another is H. Eugene Robinson, office in Hudson Bldg. He also stated he was going to Reno to be examined by specialists there.

Mr. CANNON.—Did he give the name of the specialist?

Mr. FULMER.—No, sir. He said he was advised by Grant Miller to go there.

Mr. CANNON.—Did Houston mention to you, while you were with him, that he was having any trouble sleeping at night?

Mr. FULMER.—No, sir; said he was resting quite well and feeling good.

Mr. CANNON.—Did he give you any impression that his appetite was not first class?

Mr. FULMER.—Not at all. He dined with me on two different occasions. Both times he ate a very hearty meal. During one meal he ate [39] one dozen raw oysters, together with trimmings. At another meal, he ate a porterhouse or T-bone steak, with potatoes, vegetables, etc., which he seemed to relish, in fact, he ate a very hearty meal.

Mr. CANNON.—You stated Mr. Houston walked as well as you ever saw him, now are you sure that he did not limp?

Mr. FULMER.—I did not notice him limping.

Mr. CANNON.—When did you last see him?

Mr. FULMER.—About 5:30 in the evening, on the 20th of October.

J. H. FULMER,
Brakeman."

Deposition of Dr. Frederick Hershman, for Defendant.

The deposition of Dr. FREDERICK HERSHMAN, Chief Surgeon for the Chile Exploration Company of Chuquicamata, Chile, a witness in be-

half of defendant, was read and showed that Dr. Hershman, while acting Chief Surgeon of defendant company, examined plaintiff on August 26th and August 29th, 1914, and could find nothing wrong with him. He reached the conclusion that plaintiff was not incapacitated from performing manual labor or the duties of brakeman and that he was malingering.

Testimony of Dr. C. E. Early, for Defendant.

Dr. C. E. EARLY, defendant's Chief Surgeon, a witness in behalf of defendant, testified that he saw plaintiff on the night of the collision, March 19, 1914, and during the following week while plaintiff was in the hospital, and diagnosed his injuries as a contused (bruised) left knee; that neither plaintiff's back nor his right knee was swollen or bruised; that he examined plaintiff thoroughly about a week or so after plaintiff left the hospital and could make no other diagnosis but malingering; that in his opinion plaintiff was not at the time of the trial suffering from traumatic neurasthenia.

Testimony of Dr. W. S. Holmquist, for Defendant.

Dr. W. S. HOLMQUIST, a physician and surgeon of Ely, Nevada, a witness in behalf of defendant, testified that he examined the plaintiff about a month after the collision, gave him a prescription for headache and advised him to consult a nerve specialist in San Francisco, also probably recommended a lower altitude; that from his observation [40] of plaintiff during the trial, in the courtroom

(Testimony of W. S. Holmquist.)

and on the street, it was his opinion that plaintiff was not suffering from traumatic neurasthenia.

Testimony of Dr. Donald Maclean, for Defendant.

Dr. DONALD MACLEAN, a practicing physician and surgeon of Carson City, Nevada, was called as a witness in behalf of defendant and testified in part as follows:

I have had an opportunity to observe the plaintiff, Clyde W. Houston. I have observed him here in the courtroom and on the streets and I had an opportunity to examine him last night. The examination was made in Doctor Mackenzie's office in Reno, Nevada.

I endeavored to impress Mr. Houston with the idea that I desired to examine him in the same manner I would any patient who consulted me in my office, making complaint of any serious disease, or any obscure disease; that I had no prejudice against him, desired to examine him in a purely impartial manner, for that purpose I took his history, the same as I would with any other patient, his age, the year he was born, what his occupation was, and that sort of thing, and what he complained of; and endeavored to get him to tell me exactly what his complaint was,—what his symptoms were. After having listened to such information as I got in that way, I then stripped him, and examined him as fully as one can in that manner; I examined all his reflexes, his eye reflexes, his abdominal reflexes, his knee reflexes, knee jerk, ankle clonus, and planter reflexes; I examined his heart and chest, examined his ab-

(Testimony of Dr. Donald Maclean.)

dominal organs by percussion and by palpation, that is, by sounding them and by feeling them; and I then examined his spine for tender areas. That examination convinced me that he has had no definite lesion of any kind whatsoever. All his reflexes were absolutely normal; there was neither exageration nor diminution of any of them. The examination of his spine elicited several complaints from him as to extreme tenderness in several different areas; repeated examinations failed to elicit complaint from him of tenderness in the same area at any two times. I attempted to test his muscular [41] strength by having him push with his foot against my hand; he complained of severe pain, and inability to make pressure; this complaint in my opinion, could not be true, for the reason that the pressure made against my hand by his foot was not one-quarter of the pressure that he would have to make in taking an ordinary step upon the ground. He complained of pain upon my making an effort to bend his leg upon his body. He was lying upon the table when I endeavored to bend his leg in this manner; he objected, and said it caused great pain, and refused to allow me to bend it beyond that, which is hardly the height a man would raise his leg in taking an ordinary step, certainly not the height that he would raise it in going up the stairs, leading one to believe—leading me to believe, that the pain of which he complained was feigned. I could find no abnormality of any kind, with the exception of a slightly furred tongue, which

(Testimony of Dr. Donald Maclean.)

would be natural in any man upon a milk diet or a liquid diet; and the fact that his pulse rate was faster than one would expect in a man of his type and occupation. I believe that the rate of his pulse, ninety-six to one hundred, was no faster than any man's would be who was being examined in the presence of five doctors and two lawyers and in a strange office. It is a hard matter to differentiate, in my opinion, between neurasthenia and malingering; I believe them to be nearly the same thing; they might be differentiated in this way, by saying that a malingerer is a man who is endeavoring to deceive the public, or some given person, knowing that he is deceiving them, whereas a neurasthenic is a person who is deceiving the public and himself at the same time; but in this instance I am inclined to believe that he is purely a malingerer, and not a true neurasthenic, if such a thing exists.

I don't believe a sudden physical shock, such as a man jumping from a railroad train, would cause a low position of any of the organs of the abdomen with the possible exception of the solid organs, meaning thereby the kidneys, the spleen and very possibly the liver; the heavy solid organs might be displaced in such an accident but the hollow organs, the stomach and intestines, I don't believe could be [42] displaced by such an accident. As to whether such a low position of the stomach and caecum might result from neurasthenia, I don't see how in the world such a thing could occur; I don't see how neurasthenia could cause any such condition. It is gener-

(Testimony of Dr. Donald Maclean.)

ally granted to-day that ptosis of the stomach is congenital in as good as one-third of all the cases; in the other instances, there has never been any really scientific explanation made of it. Ptosis of the stomach does not necessarily indicate a diseased condition or abnormal functioning of the stomach. It is probable that the large percentage of cases of ptosis of the stomach give rise to no symptoms whatsoever. It is more than likely that no two stomachs are in the same position in any two individuals; the probabilities are that there is a variation in all cases.

On Cross-examination.

I would not want to say that I was absolutely thoroughly satisfied that Mr. Houston is purely malingering and is a well man. I am satisfied in my own mind that he is malingering; but I will say that there might be an element of neurasthenia; in fact, I suppose in all cases of malingering there is bound to be an element of neurasthenia.

I don't believe that ptosis of the stomach of four inches and the caecum five inches will in ninety per cent or ninety-five per cent of cases cause any symptoms whatsoever.

On redirect examination, the following proceedings occurred:

"Q. What is the effect on so-called traumatic neurasthenia, involving cases where a claim for a financial reimbursement is made, of a money settlement?

A. A cure in nearly every instance. I will say that statistics show in foreign countries where these

(Testimony of Dr. Donald Maclean.)

cases are settled, where they have industrial laws for the protection of workingmen,—in Denmark, Sweden and Switzerland, where the cases are settled for a lump sum, settlements—

Mr. MILLER.—Just a moment, if the Court please; I object to the hearsay statements of counsel, outside of matters of professional [43] education and training.

Mr. CHANDLER.—(Q.) I will ask the Doctor as to whether this information is a part of the knowledge of the professional medical practitioner, and a part of the science or knowledge of the medical profession?

A. I don't know that it is a part of the knowledge of the profession as a whole, but it comes to me as the medical adviser of the Industrial Commission; it comes in my line more particularly; but I imagine that the medical profession as a whole would be familiar with these facts.

Q. Are these statistics you are about to refer to of importance to the medical practitioner in dealing with cases of this kind? A. They are.

Mr. CHANDLER.—I submit, if the Court please, that the question was proper, and ought to be answered.

Mr. MILLER.—I further object, if your Honor please, to the entire question as irrelevant—

The COURT.—I think I would rather hear from the other side. Of course if this case is feigned, if this is purely a case of malingering, there is no question but that the payment of the money will effect a

(Testimony of Dr. Donald Maclean.)

cure, but that is the very matter to be determined. It seems to me you might quite as well in the ordinary criminal case introduce testimony before the jury to show that in ninety per cent of the cases where indictments were brought against defendants, they had been convicted. I don't believe it is proper testimony.

(Discussion.)

The COURT.—If you could prove by this witness that the payment of money will effect a cure, I should certainly allow the testimony; but the fact that the payment of money in a specified number of cases has been followed by a cure, it seems to me is getting proof the wrong way. I think the case must be decided on its own merits.

Mr. CHANDLER.—We desire to note an exception.

The COURT.—You may have the exception." [44]

Instructions to Jury Requested by Defendant.

At the conclusion of the evidence, the defendant requested the Court to instruct the jury, among other things, as follows:

"Such damages only may be allowed which are shown to have been the result of the injury which he received at the time of the accident not exceeding in any respect the amount claimed in the complaint. In respect to plaintiff's nervous or other ailments which manifested themselves subsequent to the accident, you will determine from the evidence whether

they did or did not result from injuries sustained at the time. If they did, and this was the sole cause of them, or if they developed without fault or negligence of the plaintiff, you should allow proper damages therefor. If, however, they were the result wholly or in part of plaintiff's introspection, or failure to return to work in proper time, damages should not be allowed on account thereof."

The Court, however, in instructing the jury at the conclusion of the argument, after reading to the jury the above requested instruction, added: "I will change that sentence: If they did, and this was the sole cause of them—if it was the sole cause or if in part it caused them, plaintiff would be entitled to recover such damages as you in your judgment deem that he was actually entitled to."

To this modification of said requested instruction and to the giving of the instruction as so modified defendant excepted before the cause was submitted to the jury, which exception was allowed by the Court.

The entire instructions which at the conclusion of the argument were given by the Court to the jury were as follows:

Instructions of Court to Jury.

"The COURT.—Gentlemen, many of the rules that guide you in a criminal case are the same as those which should be applied in a civil case; the main difference is in the amount of testimony required to warrant a verdict.

"The burden in this case, the law throws on the plaintiff; he must establish his case, and establish

every material element of it, not beyond a reasonable doubt, but by a preponderance of the evidence; and by a preponderance of the evidence we simply mean that the testimony [45] in his favor must outweight the testimony against him; if he fails to establish his case by a preponderance of the evidence, it is your duty to find for the defendant.

"The defendant in this case is a corporation. It is needless, however, for me to instruct you that you are not to take that into consideration. The defendant, although it is a corporation, is entitled to the same full share of justice you would award to an individual. You cannot award a large verdict, or award a verdict simply because the defendant is a corporation. The case must be proven, and it must be proven by the facts, and by the evidence introduced. You are not to be swayed by sympathy, you are not to be drawn from the straight and narrow way by any other facts than those introduced in evidence. In other words, you are to do that which is fair and just and right as between one man and another.

"Each party argues that the other has a financial interest in this case, and it is true; but it is the same financial interest which occurs in every civil case; the plaintiff wants all he can get, and the defendant wants to pay as little as possible. This is always the rule; it is nothing unusual in this case.

"According to the complaint and the admissions, it appears that an accident occurred—a collision—on the Nevada Northern Railway about the 19th day of March of last year. In order to escape more seri-

ous injury, this plaintiff leaped from the train, and received certain injuries alleged in the complaint; and you are instructed that the plaintiff can only recover on the case that he made in the complaint; he can recover no more than he has asked.

"By reason of this collision, the complaint says: 'The plaintiff then and there sustained and suffered divers serious injuries of his back and spinal cord, his neck and his right leg, and was cut, scratched, bruised and injured in divers other parts of his body; that by reason of said injuries, the plaintiff has been unable to work at his regular business as brakeman for the period of 200 days and has been permanently injured and disabled so that the [46] plaintiff believes and therefore avers that he will be unable to engage in his said occupation as railway brakeman during the remainder of his life, and that he has been so injured and permanently disabled that during the remainder of his life he will be unable to do or perform any manual or other work sufficient to earn his living; that said plaintiff has not sufficient education to engage in any occupation except manual labor. That in consequence of said injuries the plaintiff suffered excruciating pain and agony of body and mind, and his nerves were greatly injured and his nervous system wholly disordered; that the defendant has been obliged to expend large sums of money and to incur large liabilities in endeavors to have himself cured of said injuries and maladies and the effects thereof. That by reason of said injuries the plaintiff has sustained loss and damage in the sum

of Fifty Thousand Dollars.'

"In the answer the defenant admits the collision, and admits that plaintiff leaped from the train in order to avoid more serious injury. It also admits that as a result of the collision plaintiff suffered slight bruises and scratches from which he speedily recovered, and which did not incapacitate him from performing his usual and ordinary work for a period of more than thirty days.

"In the present state of the issues and of the pleadings, the defendant has admitted its liability; it has admitted that as a result of this accident plaintiff did suffer slight injuries, and was incapacitated for thirty days from work. Of course, under the admission, the plaintiff is entintled to recover for that.

"The question remains as to whether he has suffered any further injury, and that is for you to determine from the evidence. You have heard the testimony, not only of the ordinary witnesses, but of the experts; and you have heard the arguments of counsel. Counsel have expressed their ideas very definitely, and the experts have also expressed themselves quite decidely on this point, and they fail to agree.

"The testimony of experts is admitted here in order to enlighten [47] you on subjects the ordinary man is not supposed to be acquainted with. The expert has technical knowledge that no one can acquire except after a long course of study, and these doctors have come here to give us the benefit of their learning; they have given their opinions,

but their opinions are to have no further weight with you than seem to be justified by the facts, by the conditions and by the evidence which you have heard. As I have told you repeatedly, it is your opinion and your judgment as to what is proven which is demanded by the law, and you are to give your own judgment, irrespective of what other opinions may have been advanced either by counsel, by witnesses, or by the Court; and that judgment is to be based on what you find in the testimony. An opinion is only to guide you in so far as it is supported by the evidence, and by the conditions which have been presented here for your examination.

"Every witness who comes upon the stand is presumed to tell the truth, and that presumption is to be indulged with reference to every witness who appears here, until by his conduct or by his demeanor upon the witness-stand, or by contradictory evidence, he is shown to have forfeited it. You are entitled to consider the interest which each witness has in this case, not only the interest of the plaintiff, but the interest of other witnesses, if they appear to have any. You are to consider their motives, their demeanor upon the witness-stand, and the manner in which they give their testimony, whether they give it frankly, freely and openly, with an evident desire to tell the truth, or whether they are reserving something that they ought to disclose.

"It is unnecessary for me to tell you that you are not to presume from the fact that a man is employed by this corporation that he is not telling the truth; nor can you indulge a similar presumption

with reference to the plaintiff because he is the plaintiff. You are simply to weigh the testimony, and determine the credibility of the witnesses, just as you would determine the truth of a story in ordinary life. [48]

"If a witness on the stand has deliberately stated that which is untrue as to a material fact, you are at liberty to disregard the whole of his testimony, except as it is corroborated by other credible evidence in the case.

"A number of instructions have been presented to me, but they were presented so late that I have not been able to go over them as carefully as I should, but I will read a number of them, and comment on others.

"You are not to consider any testimony that has been stricken out by the order of the Court.

"A party to an action may testify in his own behalf, but the law permits the interest of the witness, or the interest of a party, to be considered as affecting his credibility as a witness; and it is your duty to consider the weight to be given to the plaintiff's testimony, consider the interest which he has in the result of this action. In weighing his testimony you should also consider whether or not his statements are probable in view of all the circumstances of the case; whether or not his statements are consistent with each other; and whether or not they conflict with statements or declarations which he may have made at any previous time. If you should believe that the plaintiff, or any other witness, has falsely testified to any material fact in the case,

you will be authorized to reject all of his testimony except such testimony as is corroborated by other credible evidence. He must have wilfully testified falsely in order that that rule may become operative. If you find that a witness has merely made a mistake, it does not justify you in rejecting his testimony; it would, however, warrant a more careful examination of his evidence.

"It is not necessary that any witness should have expressed an opinion as to the amount of the damages. You can determine that yourself from the evidence which has been given, provided you can find the plaintiff is entitled to any damage in excess of that which is practically admitted. [49]

"The burden of proof is on the plaintiff to show the extent of the alleged injuries caused by the collision. If the jury believe from all the evidence in the case that plaintiff was suffering from some disease at the time of the accident, then plaintiff will not be entitled to recover damages for such disease, but would be confined to damages resulting from injuries received because of the collision; and if the jury believe from all the evidence that plaintiff is now suffering from any disease, yet, unless the jury believe from all the evidence that such disease was caused by the collision, or was increased by the collision, the plaintiff will not be entitled to recover damages for such disease, but the plaintiff is entitled to recover damages for whatever injuries, or the result thereof, you believe from all the evidence in the case he has sustained by reason of the collision.

"You will give plaintiff as damages so much

money as will fully compensate him for all loss of time he has or may hereafter suffer, and for all pain, both physical and mental, which he has or may hereafter endure as the direct, natural and probable result of defendant's fault. If you find he has any nervous trouble induced by dwelling upon his claim against the defendant railroad company, and on the probable result of his suit, you will not consider it in assessing his damages. In assessing his damages you will consider the physical injury he actually received, and mental pain and suffering which resulted directly from the injury, if any. You will not consider any fictitious pain and suffering, if you find that there is any fictitious pain and suffering, due to the disordered imagination, for he can only recover for actual and not imaginary pain.

"Plaintiff claims to have lost earnings by reason of his injury. Beyond the first thirty days it matters not what loss there has been, if any, in the earnings of the plaintiff, unless that loss was directly caused by the necessary result of the injury received on March 19th, 1914. If the plaintiff could have earned money by reasonable effort, and neglected to do so, he cannot charge such loss, if any, to the defendant. [50]

"Such damages only may be allowed as are shown to have been the result of the injury which he received at the time of the accident, not exceeding in any respect the amount claimed in the complaint. In respect to plaintiff's nervous or other ailments which manifested themselves subsequent to the accident, you will determine from the evidence whether they

did or not result from injuries sustained at the time. If they did, and that was the sole cause of them, you would allow proper damages therefor; if, however, they were the result of plaintiff's introspection or failure to return to work in the proper time, damages should not be allowed on account thereof. I will change that sentence: If they did, and this was the sole cause of them—if it was the sole cause, or if in part it caused them, plaintiff would be entitled to recover such damages as you in your judgment, deem that he was actually entitled to.

"If you believe from the evidence that plaintiff suffered only slight physical injuries as a result of the collision, although he received and suffered fright, and subsequently suffered from nervous trouble; and if you further believe from the evidence that the nervous trouble was not the result of the accident and injury which plaintiff received as a result of the collision, then you are instructed that the plaintiff cannot recover except for damages involved in the accident, and the mental and physical suffering actually resulting therefrom, if any, together with such expenses as were actually incurred by him for professional treatment and for the thirty days time, which has already been mentioned.

"I will read another instruction, which is probably to the same effect. If you find from the evidence that the plaintiff is entitled to recover, as alleged in his complaint, then in estimating his damages you may take into consideration his health and physical condition prior to the injury, also his health and physical condition since then, in so far as you find

from the evidence that his health and physical condition since then is impaired as the result of such injury; and you may also consider whether or not he has been permanently [51] injured, and to what extent, and also to what extent, if any, he may have endured physical suffering as the natural and inevitable result of such injury, and the value of any time you may believe from the evidence he has lost on account of such injury; and you may consider what, if any, effect such injuries may have upon him in the future, or in respect to his power to earn money by his labor; and you should allow him as damages such sum as, in the exercise of sound discretion, you may believe from all the facts and circumstances involved, will be a fair and just compensation to him for his injury, but not exceeding the whole sum of fifty thousand dollars.

"Damages in all cases of personal injury are divided into two classes; one of them is known as punitive, and the other as pecuniary. Punitive damages are damages which are awarded in the way of smart money; pecuniary damages are supposed to be a precise and exact compensation for the injury that is suffered. In this case you cannot award any punitive damages; you can only award a sum, if you find that the plaintiff is entitled to anything, which will be an exact equivalent of the injury he has suffered; and that is to be qualified by the instructions which have already been given to you."

The foregoing does not include all the evidence and proceedings in the cause, but does include all the

evidence and proceedings in any way affecting, bearing on or necessary to explain the exceptions taken by and allowed to defendant.

The foregoing Bill of Exceptions is hereby allowed and settled this 17th day of May, 1916.

E. S. FARRINGTON,
Judge of Said Court.

Service by copy of the within bill of exceptions on this 29th day of April, 1916, is hereby acknowledged.

DIXON & MILLER.
By A. GRANT MILLER,
Attorneys for Plaintiff. [52]

[Endorsed]: No. 1874. In the United States District Court for the District of Nevada, Ninth Circuit. Clyde W. Houston, Plaintiff, vs. Nevada Northern Ry. Co., a Corporation, Defendant. Bill of Exceptions. Filed May 1st, 1916. T. J. Edwards, Clerk. Chandler & Quayle, Attorneys for Defendant, Ely, Nevada. [53]

No. 1874.

CLYDE W. HOUSTON
vs.
NEVADA NORTHERN RY. CO.

Order Denying Motion for New Trial, of Date April 8th, 1916.

The motion for a new trial, heretofore argued and submitted, having been duly considered by the Court, it is now ordered that the same be, and is hereby, de-

nied; and that the parties have twenty days' time within which to take such further steps as advised. [54]

In the United States District Court for the District of Nevada, Ninth Circuit.

CLYDE W. HOUSTON,
Plaintiff (Defendant in Error),
vs.
NEVADA NORTHERN RAILWAY COMPANY,
a Corporation,
Defendant (Plaintiff in Error).

Petition for Writ of Error.

To the Honorable, the Said Court:

Said Nevada Northern Railway Company, your petitioner, respectfully shows: That in the record and proceedings, as also in the rendition of the judgment, of a plea which is in said court between Clyde W. Houston, plaintiff, and the Nevada Northern Railway Company, a Corporation, defendant, manifest errors have happened, to the great damage of the said Nevada Northern Railway Company, as will more particularly appear from the assignment of errors of said Nevada Northern Railway Company which is filed herewith and which is hereby referred to for all the particulars thereby shown;

WHEREFORE, your petitioner prays that a writ of error from the United States Circuit Court of Appeals of the Ninth Circuit be allowed in said cause, to the end that such errors shall be fully corrected

and full and speedy justice be done to the parties aforesaid in this behalf.

CHANDLER & QUAYLE,

Attorneys for Said Nevada Northern Railway Company.

CURTIS H. LINDLEY,

Of Counsel.

The foregoing petition is allowed this 6th day of June, 1916.

E. S. FARRINGTON,

Judge of Said Court.

[Endorsed]: No. 1874. In the United States District Court for the District of Nevada, Ninth Circuit. Clyde W. Houston, Plaintiff (Defendant in Error), vs. Nevada Northern Railway Co., a Corporation, Defendant (Plaintiff in Error). Petition for Writ of Error. Filed June 5th, 1916. T. J. Edwards, Clerk. Chandler & Quayle, Attorneys for Defendant, Ely, Nevada. [55]

In the Circuit Court of Appeals of the United States for the Ninth Circuit.

NEVADA NORTHERN RAILWAY COMPANY, a Corporation,

Plaintiff in Error,

vs.

CLYDE W. HOUSTON,

Defendant in Error.

Assignment of Errors.

Comes now the said Nevada Northern Railway

Company, plaintiff in error, and says that in the record and proceedings in the above-entitled matter there is manifest error in this:

1. The District Court erred in excluding from evidence on the redirect examination of witness Jacob H. Fulmer the copy of the written statement made by said witness to the General Manager of the plaintiff in error, a portion of which statement was read to the witness Fulmer on cross-examination and on which he was cross-examined.

The said statement so excluded from evidence was in the words and figures following:

"East Ely, Nevada, November 5th, 1914.

STATEMENT MADE BY MR. J. H. FULMER.

Mr. CANNON.—Mr. Fulmer, you were in Ogden recently; what date was it?

Mr. FULMER.—I was in Ogden on the 17th day of October, 1914.

Mr. CANNON.—You were there several days, weren't you?

Mr. FULMER.—Yes, sir.

Mr. CANNON.—While you were there, did you see C. W. Houston, who formerly was a brakeman for this company?

Mr. FULMER.—Yes, sir.

Mr. CANNON.—On what date did you first see him? [56]

Mr. FULMER.—I saw him on the 17th of October.

Mr. CANNON.—Did he see you on the same date?

Mr. FULMER.—Yes, sir.

Mr. CANNON.—I wish you would state just what transpired.

Mr. FULMER.—I arrived in Ogden about 5:40 in the evening, on October 17th. About seven o'clock in the evening, I was standing on the corner of Twenty-fifth St. and Washington Ave. Mr. Houston, in company with two other gentlemen, passed me. After they had passed, I thought I recognized Houston, and I followed them a short distance behind, for about three blocks on Twenty-fifth St. towards the depot.

Mr. CANNON.—Did you catch up with him, and have a conversation with him?

Mr. FULMER.—They stopped and I caught up with them.

Mr. CANNON.—Will you please state what your conversation was?

Mr. FULMER.—I asked Mr. Houston how he felt; he said he felt very good. I asked him where he lived; he said out on Thirty-fifth St. I asked him if he had been working any; he said he had not, that he was unable to secure any work, but he had the promise of a job with a canning factory.

Mr. CANNON.—Did he tell you what kind of work he was going to do for the canning factory?

Mr. FULMER.—No, sir; he did not. He just said that he had a promise of a job with a canning factory.

Mr. CANNON.—Did he indicate by his method or manner of walking, or otherwise, that he was not in first-class physical condition?

Mr. FULMER.—He apparently was as well as I ever saw him. He walked just as well as I ever saw him walk.

Mr. CANNON.—Did he have anything to say to you in regard to the suit which he has instituted against this company?

Mr. FULMER.—Not on that day.

Mr. CANNON.—Then you saw him subsequently?

Mr. FULMER.—I did.

Mr. CANNON.—Did he then have anything to say? [57]

Mr. FULMER.—I saw him on the following day, the 18th. Was with him all the forenoon and up until 2:45 o'clock in the afternoon. He seemed to be in good spirits and good health.

Mr. CANNON.—Did he mention anything about the suit?

Mr. FULMER.—Not on that day.

Mr. CANNON.—That is, not on the 18th.

Mr. FULMER.—No, sir.

Mr. CANNON.—Did he have anything to say about the suit on the following day, or on any subsequent day?

Mr. FULMER.—He did, yes; on the 20th.

Mr. CANNON.—Will you please state what he said?

Mr. FULMER.—He and I were walking around that day and finally sat down on the curb, facing Twenty-fifth St. and Washington Ave. He told me that if the Nevada Northern Railway Company had given him $1,000.00 and a lifetime job, he would have settled with them.

Mr. CANNON.—Your conversation with him, and your association with him would not convince you that he was incapacitated for taking care of himself,

without a lifetime job from anybody?

Mr. FULMER.—No, sir.

Mr. CANNON.—You stated that he lived beyond Thirty-fifth St. on Washington Ave.—had he been in the habit of riding in on the street-cars, or walking in?

Mr. FULMER.—He was in the habit of walking in, so he told me.

Mr. CANNON.—The distance is some three miles, is it not?

Mr. FULMER.—Now I would not say for sure as to the exact distance—I think the blocks run eight to the mile, and it is much more than a mile.

Mr. CANNON.—He preferred to walk than ride?

Mr. FULMER.—Yes, sir. He said he had been in the habit of walking back and forth.

Mr. CANNON.—Did he say anything to you about being under a doctor's care? [58]

Mr. FULMER.—He said he had been examined by two physicians in Ogden.

Mr. CANNON.—Did he mention the names of those physicians?

Mr. FULMER.—He did.

Mr. CANNON.—Will you kindly give the names?

Mr. FULMER.—One of them is Dr. R. E. Worrell, Eccles Bldg., Ogden; as to the other one, he said Dr. Robinson. There are two doctors of this name, one A. A. Robinson, office in Lewis Bldg., and another is H. Eugene Robinson, office in Hudson Bldg. He also stated he was going to Reno to be examined by specialists there.

Mr. CANNON.—Did he give the name of the specialist?

Mr. FULMER.—No, sir. He said he was advised by Grant Miller to go there.

Mr. CANNON.—Did Houston mention to you, while you were with him, that he was having any trouble sleeping at night?

Mr. FULMER.—No, sir; said he was resting quite well and feeling good.

Mr. CANNON.—Did he give you any impression that his appetite was not first-class?

Mr. FULMER.—Not at all. He dined with me on two different occasions. Both times he ate a very hearty meal. During one meal he ate one dozen raw oysters, together with trimmings. At another meal, he ate a porterhouse or T-bone steak, with potatoes, vegetables, etc., which he seemed to relish, in fact, he ate a very hearty meal.

Mr. CANNON.—You stated Mr. Houston walked as well as you ever saw him, now are you sure that he did not limp?

Mr. FULMER.—I did not notice him limping.

Mr. CANNON.—When did you last see him?

Mr. FULMER.—About 5:30 in the evening, on the 20th of October.

J. H. FULMER,
Brakeman." [59]

2. The Court erred in sustaining the objection to the answer of the witness Maclean to the following question: "What is the effect of so-called traumatic neurasthenia, involving cases where claim for a financial reimbursement is made, of a money settlement?"

and in prohibiting the witness in his answer from stating the results shown in foreign countries and in Denmark, Sweden and Switzerland (where there are industrial laws for the protection of working men) as to the effects on traumatic neurasthenia patients of lump sum settlements.

The testimony and proceedings on this point in the examination of the witness Maclean as shown by the transcript of the testimony were as follows:

"Q. What is the effect on so-called traumatic neurasthenia, involving cases where a claim for a financial reimbursement is made, of a money settlement?

A. A cure in nearly every instance. I will say that statistics show in foreign countries where these cases are settled, where they have industrial laws for the protection of working men,—in Denmark, Sweden and Switzerland, where the cases are settled for a lump sum, settlements—

Mr. MILLER.—Just a moment, if the Court please; I object to the hearsay statements of counsel, outside of matters of professional education and training.

Mr. CHANDLER.—(Q.) I will ask the doctor as to whether this information is a part of the knowledge of the professional medical practitioner, and a part of the science or knowledge of the medical profession?

A. I don't know that it is a part of the knowledge of the profession as a whole, but it comes to me as the medical adviser of the Industrial Commission; it comes in my line more particularly; but I imagine

that the medical profession as a whole would be familiar with these facts.

Q. Are these statistics you are about to refer to of importance to the medical practitioner in dealing with cases of this kind? [60]

A. They are.

Mr. CHANDLER.—I submit, if the Court please, that the question was proper, and ought to be answered.

Mr. MILLER.—I further object, if your Honor please, to the entire question as irrelevant—

The COURT.—I think I would rather hear from the other side. Of course if this case is feigned, if this is purely a case of malingering, there is no question but that the payment of the money will effect a cure, but that is the very matter to be determined. It seems to me you might quite as well in the ordinary criminal case introduce testimony before the jury to show that in ninety per cent of the cases where indictments were brought against defendants, they had been convicted. I don't believe it is proper testimony.

(Discussion.)

The COURT.—If you could prove by this witness that the payment of money will effect a cure, I should certainly allow the testimony; but the fact that the payment of money in a specified number of cases has been followed by a cure, it seems to me is getting proof the wrong way. I think the case must be decided on its own merits.

Mr. CHANDLER.—We desire to note an exception.

The COURT.—You may have the exception."

3. The Court erred in modifying and giving to the jury as modified the eighth instruction requested by plaintiff in error. This instruction as requested by plaintiff in error read as follows:

"Such damages only may be allowed which are shown to have been the result of the injury which he received at the time of the accident not exceeding in any respect the amount claimed in the complaint. In respect to plaintiff's nervous or other ailments which manifested themselves subsequent to the accident, you will determine from the evidence whether they did or did not result from injuries sustained at the time. If they did, and this was the [61] sole cause of them, or if they developed without fault or negligence of the plaintiff, you should allow proper damages therefor. If, however, they were the result wholly or in part of plaintiff's introspection, or failure to return to work in proper time, damages should not be allowed on account thereof."

The Court read the instruction as above set forth, to the jury, and then added: "I will change that sentence: If they did, and this was the sole cause of them —if it was the sole cause, or if in part it caused them, plaintiff would be entitled to recover such damages as you in your judgment, deem that he was actually entitled to."

WHEREFORE, the said Nevada Northern Railway Company, plaintiff in error, prays that the judgment of the said United States District Court for the District of Nevada in the above-entitled cause be re-

versed, and that the said Court be directed to grant plaintiff in error a new trial in said cause.

CHANDLER & QUAYLE,
Attorneys for Plaintiff in Error.

CURTIS H. LINDLEY,
Of Counsel.

[Endorsed]: In the Circuit Court of Appeals of the United States, for the Ninth Circuit. Nevada Northern Railway Co., a Corporation, Plaintiff in Error, vs. Clyde W. Houston, Defendant in Error. Assignment of Errors. Filed June 5th, 1916. T. J. Edwards, Clerk U. S. Dist. Court, Dist. Nevada. Chandler & Quayle, Attorneys for Plaintiff in Error. Ely, Nevada. [62]

In the District Court of the United States for the District of Nevada, Ninth Circuit.

NEVADA NORTHERN RAILWAY COMPANY,
a Corporation,
Plaintiff in Error,
vs.
CLYDE W. HOUSTON,
Defendant in Error.

Supersedeas and Cost Bond.

KNOW ALL MEN BY THESE PRESENTS, That, WHEREAS, the said plaintiff in error, the Nevada Northern Railway Company, a corporation, has sued out a Writ of Error in the above-entitled cause from the Circuit Court of Appeals of the Ninth Circuit, and desires to secure a supersedeas and stay

of proceedings and process on the judgment in said cause;

NOW, THEREFORE, the undersigned Nevada Northern Railway Company, said plaintiff in error, as principal, and W. N. McGill of Ely, Nevada, by occupation a rancher and stockman, and D. P. Bartley, of Ely, Nevada, by occupation a druggist, as sureties, in consideration of the premises and of the said supersedeas and stay of process and proceedings, do hereby, jointly and severally, undertake in the sum of Sixteen Thousand Dollars, lawful money of the United States, and in the said sum do promise that said Nevada Northern Railway Company shall prosecute its said writ of error to effect and shall answer all damages and costs if it fails to make its plea good.

IN WITNESS WHEREOF, the said principal has caused these presents to be executed by its Vice-President and General Manager, and the said sureties have hereunto subscribed their names this [63] twenty-ninth day of May, 1916.

NEVADA NORTHERN RAILWAY COMPANY.

By L. G. CANNON,
Its Vice-President and General Manager.

W. N. McGILL.

D. P. BARTLEY.

State of Nevada,
County of White Pine,—ss.

W. N. McGill and D. P. Bartley, the sureties named in and who signed the above undertaking, being first duly sworn, each for himself and not one for the other, deposes and says: That he is a resident

and householder within the County of White Pine, State of Nevada, and is worth the amount specified in said undertaking, over and above his just debts and liabilities, exclusive of property exempt from execution.

W. N. McGILL.
D. P. BARTLEY.

Subscribed and sworn to before me this 31st day of May, 1916.

[Seal] C. O. FLEMING,
Notary Public in and for said County and State.

The foregoing undertaking and the sureties therein named are hereby approved this 6th day of June, 1916.

E. S. FARRINGTON,
Judge of the District Court of the United States for the District of Nevada, Ninth Circuit.

[Endorsed]: No. 1874. In the District Court of the United States for the District of Nevada, Ninth Circuit. Nevada Northern Railway Company, Plaintiff in Error, vs. Clyde W. Houston, Defendant in Error. Supersedeas and Cost Bond. Filed June 7th, 1916. T. J. Edwards, Clerk. Chandler & Quayle, Attorneys for Plaintiff in Error, Ely, Nevada. [64]

In the District Court of the United States for the District of Nevada.

No. 1874.

CLYDE W. HOUSTON,

Plaintiff,

vs.

NEVADA NORTHERN RAILWAY COMPANY, a Corporation,

Defendant.

Certificate of Clerk U. S. District Court to Transcript of Record.

I, T. J. Edwards, Clerk of the District Court of the United States for the District of Nevada, do hereby certify that the foregoing sixty-four (64) typewritten pages, numbered from 1 to 64, inclusive, to be a full, true and correct copy of the record and of all proceedings in said cause and court, and that the same, together with the original Citation and Writ of Error, hereto annexed, constitute the return to the Writ of Error.

I further certify that no opinion has been filed by the Court, denying the Motion for a New Trial.

I further certify that the cost of the foregoing record is $75.80 and that the same has been paid by the defendant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said court, at my office in Carson City, Nevada, this 3d day of July, 1916.

[Seal] T. J. EDWARDS,
Clerk.

[Ten Cent Internal Revenue Stamp. Canceled 7/3/16. T. J. E.] [65]

Citation on Writ of Error.

UNITED STATES OF AMERICA,—ss.

To Clyde W. Houston, Greeting:

You are hereby cited and admonished to be and appear at a term of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden in the City and County of San Francisco on the 5th day of July, 1916, pursuant to writ of error filed in the Clerk's office of the District Court of the United States for the District of Nevada, Ninth Circuit, wherein the Nevada Northern Railway Company, a corporation, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

E. S. FARRINGTON,

Judge of the United States District Court for the District of Nevada.

Dated June 6th, 1916.

Due service and receipt of copy of the within citation on this 12th day of June, 1916, is hereby acknowledged.

DIXON & MILLER,

By A. GRANT MILLER,

Attorneys for Clyde W. Houston, Defendant in Error. [66]

[Endorsed]: No. 1874. In the United States Circuit Court of Appeals for the 9th Circuit. Nevada Northern Railway Co., a Corporation, Plaintiff in

Error, vs. Clyde W. Houston, Defendant in Error. Citation to Circuit Court of Appeals on Writ of Error. Filed June 13th, 1916. T. J. Edwards, Clerk U. S. Dist. Court, Dist. Nevada. [67]

Writ of Error.

UNITED STATES OF AMERICA,—ss.

The President of the United States of America to the Judge of the District Court of the United States for the District of Nevada, Greeting:

Because in the record and proceedings and as also in the rendition of the judgment of a plea which is in the said District Court before you between Clyde W. Houston, Plaintiff, and Nevada Northern Railway Company, a corporation, defendant, a manifest error hath happened, to the great damage of said Nevada Northern Railway Company, as is said and appears by the complaint: We, being willing that such error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Justices of the United States Circuit Court of Appeals for the Ninth Circuit, at the courtrooms of said court in the Federal Building in the City and County of San Francisco, State of California, together with this writ, so that you have the same at said place before the Justices aforesaid on the 5th day of July next, that the records and proceedings aforesaid being in-

spected, the said Justices of the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable EDWARD DOUGLAS WHITE, Chief Justice of the Supreme Court of the United States, this 7th day of June, in the year of our Lord one thousand nine hundred sixteen, and of the Independence of the United States the [68] one hundred fortieth.

[Seal] T. J. EDWARDS,
Clerk of the District Court of the United States for the District of Nevada, Ninth Circuit.

The foregoing writ is hereby allowed.

E. S. FARRINGTON,
Judge of the District Court of the United States for the District of Nevada, Ninth Circuit.

The plaintiff in error has served the foregoing writ of error on this 7th day of June, 1916, by lodging a copy thereof for the defendant in error in my office, where the record in said cause remains.

T. J. EDWARDS,
Clerk of the District Court of the United States for the District of Nevada, Ninth Circuit. [69]

[Endorsed]: In the United States Circuit Court of Appeals for the 9th Circuit. Nevada Northern Railway Co., a Corporation, Plaintiff in Error, vs. Clyde W. Houston, Defendant in Error. Writ of Error. Filed June 7th, 1916, T. J. Edwards, Clerk U. S .Dist. Court, Dist. Nevada.

[Endorsed]: No. 2826. United States Circuit Court of Appeals for the Ninth Circuit. Nevada Northern Railway Company, a Corporation, Plaintiff in Error, vs. Clyde W. Houston, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the District of Nevada.

Filed July 5, 1916.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,

Deputy Clerk.

No. 2827

United States

Circuit Court of Appeals

For the Ninth Circuit.

In the Matter of CREECH BROTHERS LUMBER COMPANY, a Corporation, Bankrupt.

A. R. TITLOW, as Receiver of the UNITED STATES NATIONAL BANK OF CENTRALIA, Appearing in the Name and Stead of ROBERT G. CHAMBERS, as Trustee in Bankruptcy of the Estate of CREECH BROTHERS LUMBER COMPANY, a Corporation, Bankrupt,

Petitioner and Appellant,

vs.

H. W. MacPHAIL,

Respondent and Appellee.

Petition for Revision

Under Section 24b of the Bankruptcy Act of Congress, Approved July 1, 1898, to Revise, in Matter of Law, an Order of the United States District Court for the Western District of Washington, Southern Division

AND

TRANSCRIPT OF RECORD

Upon Appeal from the United States District Court for the Western District of Washington, Southern Division.

Filed
D 1916
F. D. Monckton,
Clerk

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

No. 2827

United States

Circuit Court of Appeals

For the Ninth Circuit.

In the Matter of CREECH BROTHERS LUMBER COMPANY, a Corporation, Bankrupt.

A. R. TITLOW, as Receiver of the UNITED STATES NATIONAL BANK OF CENTRALIA, Appearing in the Name and Stead of ROBERT G. CHAMBERS, as Trustee in Bankruptcy of the Estate of CREECH BROTHERS LUMBER COMPANY, a Corporation, Bankrupt,

Petitioner,

vs.

H. W. MacPHAIL,

Respondent.

Petition for Revision

Under Section 24b of the Bankruptcy Act of Congress, Approved July 1, 1898, to Revise, in Matter of Law, an Order of the United States District Court for the Western District of Washington, Southern Division.

INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	Page
Assignment of Errors	71
Attorneys, Names and Addresses of	17
Certificate Directing Appeal or Petition for Review	73
Certificate of Clerk U. S. District Court to Transcript of Record	77
Citation on Appeal	78
Demand and Notice of Receiver of U. S. National Bank of Centralia to Trustee in Bankruptcy	67
Exceptions of Receiver to Findings of Fact and Conclusions of Law	62
EXHIBITS:	
Exhibit "A"—Indenture, October 29, 1912, Between Creech Bros. Lumber Co. and H. W. MacPhail	22
Exhibit "A"—Order Allowing Claim of H. M. MacPhail	10
Exhibit "B–1"—Agreement, October 21, 1912—Between Creech Bros. Lumber Co. and Creditor of H. W. MacPhail	27
Exhibit "B–2"—List of Signers	31
Exhibit "B–3"—List of Signers	31

Index.

Page

EXHIBITS—Continued:

Exhibit "B–4"—List of Signers..... 32

Exhibit "C"—Actual Cash Receipts and Expenditures of Creech Bros. Lumber Company by H. W. MacPhail, Assignee 33

Exhibit "D"—Interest Due H. W. MacPhail, as Assignee 35

Findings of Fact and Conclusions of Law..... 57

Names and Addresses of Attorneys..... 17

Notice of Application for Extension of Time to File Record, etc..... 80

Notice of Filing of Proposed Statement of Evidence 49

Notice of Filing Petition for Review..... 1

Objections to the Claim of MacPhail..... 52

Objections to the Proof of Claim of H. W. MacPhail 50

Order Allowing Appeal 72

Order Allowing Claim of H. W. MacPhail..... 65

Order Approving Statement of Evidence..... 48

Order Disallowing Priority to Claim of H. W. MacPhail 50, 76

Order Extending Time to File Record upon Petition for Review and Appeal..... 81

Order Permitting Creditor to Take Appellate Proceedings in Name of Trustee..... 69

Order Shortening Period of Notice of Receiver to Trustee in Bankruptcy..... 68

Petition for Appeal..... 70

Petition for Review of Referee's Order..... 73

Index. Page

Petition to Review in Matters of Law Under Section 24B of the Bankruptcy Act..... 2
Praecipe of Appellant and Petitioner for Record. 17
Proof of Claim of H. W. MacPhail, Assignee... 19
Statement of Evidence..... 35
TESTIMONY ON BEHALF OF CLAIMANT:
LEWIS, B. H..... 35
Cross-examination 39
Redirect Examination 42
MacPHAIL, H. W. 43
Cross-examination 45
Redirect Examination 46
Recross-examination 46

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 2827.

In the Matter of CREECH BROTHERS LUMBER COMPANY, a Corporation, Bankrupt.

Notice of Filing Petition for Review.

To H. W. MacPhail and Messrs. Welsh & Welsh and M. M. Richardson, His Attorneys:

Please take notice that on the 12th day of July, 1916, at the hour of 10 o'clock in the forenoon, we will file in the clerk's office of the United States *Circuit of* Appeals for the Ninth Circuit, in the City of San Francisco, State of California, a petition for review in the above-entitled cause, a copy of which petition is annexed hereto and made a part of this notice.

OLDHAM & GOODALE,
Attorneys for Petitioner.

Office and Postoffice Address: 1408 Hoge Building, Seattle, King County, Washington.

We hereby acknowledge the receipt of copy of petition of A. R. Titlow, Receiver of the United States National Bank, acting in the name and stead of the trustee in bankruptcy, for review herein, and of notice thereof and service of the same this 6th day of July, 1916.

WELSH & WELSH,
M. M. RICHARDSON,
Attorneys for H. W. MacPhail.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. ——

In the Matter of CREECH BROTHERS LUMBER COMPANY, a Corporation, Bankrupt.

Petition to Review in Matters of Law Under Section 24B of the Bankruptcy Act.

Your petitioner, A. R. Titlow, Receiver of the United States National Bank of Centralia, appearing herein in the name and stead of Robert G. Chambers, as trustee in bankruptcy of this estate, does hereby represent as follows:

A petition in involuntary bankruptcy was duly filed against the above-named Creech Brothers Lumber Company, a corporation, in the United States District Court for the Western District of Washington, Southern Division, on the 27th day of August, 1914, and such proceedings were thereafter had that that company was duly adjudicated a bankrupt in due course, on November 16, 1914, and on the 28th day of December, 1914, one Robert G. Chambers was duly appointed trustee of said bankrupt and is now the duly appointed, qualified and acting trustee.

That your petitioner is the receiver appointed by the Comptroller of the Currency of the United States of America, of the United States National Bank of Centralia, a national banking association organized and existing under the laws of the United States relative to such associations, which bank became insolvent on September 21, 1914, and a receiver therefor

was appointed on that date; that as such receiver your petitioner is a creditor of the above-named bankrupt in the sum of $16,255.75, and his claim in that sum has been duly proved and allowed herein.

That on the 26th day of April, 1915, one H. W. MacPhail filed his proof of claim in said bankruptcy cause claiming to be entitled to a preferred claim against said estate in the sum of $15,170.69, representing the amount of alleged advances made to the bankrupt corporation with interest thereon, which he claimed to have made pursuant to a certain instrument executed by the bankrupt on the 29th day of October, 1912. This instrument, together with the other instruments hereinafter referred to under which said claim is asserted, is attached to and made a part of MacPhail's proof of claim herein, which will be brought before this court as a part of the record in the court below, and is therefore not here set forth in full. In substance it is as follows:

It recites the insolvency of the lumber company and its inability to procure credit or operate its plant, and that MacPhail has signified his willingness to finance the operation of the plant, provided he could be protected for all sums advanced or contracted by him, and provided the creditors would extend the time of payment of their claims and desist from pressing said claims. It then provides that MacPhail is appointed the sole agent of the lumber company, to take charge of all of its property, with full authority to sell and dispose of it and to use the money obtained from the sale for the purpose of paying the indebtedness of the corporation or the operat-

ing expenses, or any other purpose for which MacPhail may deem it best to use such money, or for the purpose of enlarging or repairing the plant, giving MacPhail also the authority to borrow money or otherwise contract indebtedness in the name of the corporation, to purchase logs, employ labor, etc., on cash or on credit. It is provided that any sums advanced by the second party or any sums which he may contract as indebtedness in the operation of the plant or in the purchase of logs or employment of labor shall be a first and prior lien, and shall be paid prior to any sums now due the creditors of the company. MacPhail agrees to operate the plant for and in the name of the corporation as long as it can be operated at a net profit of $1,000 or more per month, and that from the profits derived from the operation he shall first reimburse himself for any sums advanced, and shall next pay any indebtedness which he may contract, and the remainder he shall pay to the creditors pro rata, until all their claims have been paid, together with 8% interest, paying the surplus, if any, to the lumber company.

It is further provided that if the plant, when operated in a business like manner, shall not clear the sum of $1,000 per month net, that MacPhail may at his option cease to operate it and sell and dispose of all of the property of the company for the purpose of first reimbursing himself for any sums advanced or any sums contracted in the operation of the plant; and, second, to pay the creditors of the lumber company in full or *pro rata.* MacPhail is also constituted the agent of the lumber company

to employ all necessary managers and agents and other persons for the purpose of carrying out the agreement, and agrees to accept the trust and to execute the same to the best of his ability.

This instrument was signed by the officers of the lumber company and by a majority of its stockholders.

The instrument of which the substance is hereinbefore set forth is marked exhibit "A," and attached to claimant's proof of claim. Certain other exhibits, "B–1," "B–2," "B–3," and "B–4," "C," and "D" are also attached thereto. The exhibits "B" referred to are all duplicates of each other except that the signers are different, such persons being different creditors of the corporation. This paper recites the insolvency of the lumber company and that the stockholders and trustees of the company have agreed to make an assignment to H. W. MacPhail for the benefit of all the creditors of the company, and that MacPhail has agreed to operate the plant as assignee and finance its operation, provided it can be operated at a profit and also provided the creditors will extend the time of payment of their accounts and desist from pressing them until they can be paid by the profits derived from the operation of the plant. It then provides that the undersigned creditors, in consideration of the assignment and MacPhail's agreement to finance the plant, severally agree that they will extend the time of payment of their claims and desist from pressing them in the courts or otherwise, so long as the plant can be operated at a monthly net profit of $1,000 or more

per month. It is further provided that in the operation of the plant MacPhail shall first pay the cost of operation and all sums contracted by him as assignee and all sums advanced by him, and thereafter shall pay the creditors 8% interest, and the balance to the creditors pro rata upon their claims until all indebtedness is paid. The proof showed that there were a number of creditors who did not sign these exhibits "B."

Exhibits "C" and "D" above referred to purport to show advances made by MacPhail and expenditures on account of the corporation and sums received by him. According to these exhibits, MacPhail advanced $13,877.71 more than he was repaid by the corporation, and he claims priority of payment for this sum, together with interest thereon.

Your petitioner, after requesting the trustee in bankruptcy to file objections to this claim and the trustee's refusal so to do, filed objections in the trustee's name and stead, after first procuring permission from the Court. A hearing was had before the referee, and on October 6, 1915, the referee entered an order disallowing the preferred claim without prejudice to MacPhail's right to file a general claim, or the trustee's right to sue MacPhail to recover preferences. MacPhail filed a petition for review which came on for hearing before the Honorable Jeremiah Neterer, Judge of the District Court, and on June 12, 1916, the District Court entered an order reversing the referee and awarding priority to MacPhail's claim in the principal amount claimed. A copy of this order is hereto annexed, marked exhibit

"A" and made a part of this petition.

Your petitioner thereupon made written demand upon the trustee in bankruptcy to take such steps as might be necessary to procure a review of said order, but the trustee refused to take such steps. Your petitioner then applied to the District Court, and by order entered on the 21st day of June, 1916, was permitted to take such proceedings in the name and stead of the trustee in bankruptcy.

The evidence before the referee and before the District Court showed, in addition to the facts hereinbefore referred to, that the United States National Bank of Centralia was not a creditor of the bankrupt at the time of the assignment to MacPhail, but subsequently became such; that certain of its officers, one Dysart and one Gilchrist, took some part in procuring signatures of various creditors to the exhibits "B" above referred to. It did not appear that these officers were acting for the United States National Bank at the time. It further appeared from the schedules of the bankrupt that there were a number of other creditors whose names did not appear as signers of exhibit "B." Your petitioner, acting in the name and stead of the trustee in bankruptcy in both of the courts below, contended:

1. That as a matter of law exhibit "A" hereinbefore referred to gave MacPhail a right to priority of payment even as against the bankrupt only from profits or moneys realized upon the sale of the assets by him. The assets were not sold by him, but were sold in the bankruptcy proceedings, and the proof showed that he did not make any profits, but that on

the contrary the plant lost money while he was in charge of it.

2. That none of the creditors agreed that he should have a lien against the assets of bankrupt, some of the creditors merely assenting under exhibits "B" above referred to, to his reimbursing himself out of the profits, if he could make any, and agreeing to extend the time of payment of their claims and to desist from pressing them in the courts as long as MacPhail could make a profit of $1,000 per month; these matters being matters of law arising upon the face of said exhibits "B."

3. That the facts above referred to showing the assent of certain officers of the United States National Bank to the arrangement with MacPhail are as a matter of law insufficient to show the assent of the bank.

4. That whether or not the bank assented is immaterial, since the rights asserted by your petitioner are those of the trustee in bankruptcy; that such rights are superior to those of MacPhail under the instruments above referred to, since it was undisputed that none of these instruments had been filed or recorded as required by the statutes of the State of Washington in order to give effect to the lien thereby purported to be created.

Your petitioner's contentions upon these various points were overruled by the District Court in the order complained of (to which due exception was taken), and your petitioner states that for these reasons such order is erroneous and unjust to the trustee in bankruptcy and to each and every one of the

creditors of this estate and to the United States National Bank of Centralia and its receiver.

All of the facts hereinbefore set forth will be made to appear unto your Honors by a transcript of the record in the District Court, which will be transmitted to this court and which is hereby made a part of this petition, and your petitioner states that the questions arising upon the face of said record are questions of law and do not involve any disputed question of fact.

WHEREFORE your petitioner prays that said order of the United States District Court for the Western District of Washington, Southern Division, be reviewed, revised and reversed, and the District Court and the Referee in Bankruptcy be ordered to disallow priority to said claim; and for such other and further relief as your petitioner may be entitled to in equity.

OLDHAM & GOODALE,
Attorneys for Petitioner.

Office and Postoffice Address: 1408 Hoge Building, Seattle, King County, Washington.

State of Washington,
County of King,—ss.

A. R. Titlow, being first duly sworn, on oath deposes and says:

That he is the receiver of the United States National Bank of Centralia, Washington, and is the petitioner in the foregoing petition for review, and filed such petition in the name and stead of Robert G. Chambers, trustee in bankruptcy of Creech Brothers Lumber Company, bankrupt; that he has

read the foregoing petition, knows the contents thereof, and that the same is true.

A. R. TITLOW.

Subscribed and sworn to before me this 5th day of July, 1916.

[Seal] WALTER L. N. OSSAMAN,
Notary Public in and for the State of Washington,
Residing at Seattle.

Exhibit "A"—Order Allowing Claim of H. W. MacPhail.

In the District Court of the United States for the Western District of Washington, Southern Division.

No. 1627.

In the Matter of CREECH BROTHERS LUMBER COMPANY, a Corporation, Bankrupt.

This cause duly came on for hearing on the 25th day of March, 1916, upon the petition of H. W. MacPhail to review an order of the referee in bankruptcy entered herein on the 6th day of October, 1915, disallowing the preferred claim sought to be established by the said H. W. MacPhail. The cause was argued by counsel, and now, upon consideration thereof, it is

ORDERED, that the claim of said H. W. MacPhail be, and it is hereby allowed as preferred in the sum of thirteen thousand eight hundred seventy-seven & 74/100ths dollars ($13,877.74).

To all of which A. R. Titlow, receiver of the United States National Bank, a creditor of this estate appearing herein and objecting to the allowance of such claim in the name and stead of the trustee in

bankruptcy, with leave of Court first obtained upon the refusal of the trustee in bankruptcy so to do, duly excepted in the name and stead of the trustee, and such exceptions are allowed.

Done in open court this 12th day of June, 1916.

JEREMIAH NETERER,
Judge.

And the said A. R. Titlow, in the capacity hereinbefore mentioned, further specifically excepted to the foregoing order upon the following grounds, to wit:

1. Upon the ground that under the instruments upon which MacPhail relies for priority, to wit: Exhibits "A," "B–1," "B–2," "B–3," and "B–4," attached to MacPhail's proof of claim, he could claim priority of payment even as against the bankrupt only from profits or from moneys realized from the sale of the assets by him, and that the only assent given by the creditors was that some of them assented to MacPhail's reimbursing himself out of the profits of the operation of the plant, if he made any, and such creditors agreed only to extend the time of payment of their claims and desist from pressing them as long as MacPhail could make a profit of $1,000 or more per month, and that not all of the creditors assented even to that extent.

2. That the evidence and the facts found are insufficient as matter of law to charge the United States National Bank with notice or to imply assent on its part to the arrangement for giving MacPhail priority, and for the further reason that the objecting creditor is here asserting the rights of the trustee

in bankruptcy, and therefore no estoppel against any particular creditor, even if such existed, is material.

3. For the further reason that the conveyance or assignment to MacPhail, being an instrument creating a lien and not being filed, recorded, executed or acknowledged as required by the statutes of the State of Washington, is invalid as against the trustee in bankruptcy and the creditors of this estate.

4. For the further reason that under the evidence and the facts found by the Court, MacPhail is as a matter of law not entitled to a preferred claim in the sum of $13,877.74 or any other sum.

The foregoing exceptions presenting questions of law which were urged before this court upon the hearing of MacPhail's petition to review the order of the Referee in Bankruptcy disallowing his preferred claim are hereby allowed this 12th day of June, 1916.

JEREMIAH NETERER,
Judge.

[Endorsed]: No. 2827. United States Circuit Court of Appeals for the Ninth Circuit. In the Matter of Creech Brothers Lumber Company, a Corporation, Bankrupt. A. R. Titlow, as Receiver of the United States National Bank of Centralia, Appearing in the Name and Stead of Robert G. Chambers, as Trustee in Bankruptcy of the Estate of Creech Brothers Lumber Company, a Corporation, Bankrupt, Petitioner, vs. H. W. MacPhail, Respondent. Petition for Revision Under Section 24b of the

Bankruptcy Act of Congress, Approved July 1, 1898, to Revise, in Matter of Law, an Order of the United States District Court for the Western District of Washington, Southern Division.

Filed July 12, 1916.

FRANK D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

No. 2827

United States

Circuit Court of Appeals

For the Ninth Circuit.

In the Matter of CREECH BROTHERS LUMBER COMPANY, a Corporation, Bankrupt.

A. R. TITLOW, as Receiver of the UNITED STATES NATIONAL BANK OF CENTRALIA, Appearing in the Name and Stead of ROBERT G. CHAMBERS, as Trustee in Bankruptcy of the Estate of CREECH BROTHERS LUMBER COMPANY, a Corporation, Bankrupt,

Appellant,

vs.

H. W. MacPHAIL,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the Western District of Washington, Southern Division.

Names and Addresses of Attorneys.

R. P. OLDHAM, Esquire, #1408 Hoge Building, Seattle, Washington,

R. C. GOODALE, Esquire, #1408 Hoge Building, Seattle, Washington,

Attorneys for A. R. Titlow, as Receiver of U. S. National Bank of Centralia, Washington, Appellant Herein.

JOHN T. WELSH, Esquire, South Bend, Washington, MARTIN C. WELSH, Esquire, Raymond, Washington, and M. M. RICHARDSON, Esquire, Raymond, Washington,

Attorneys for Appellee. [1*]

In the District Court of the United States for the Western District of Washington, Southern Division.

No. 1627.

In the Matter of CREECH BROTHERS LUMBER COMPANY, a Corporation, Bankrupt.

Praecipe of Appellant and Petitioner for Record.

To Frank L. Crosby, Clerk of Said Court:

Kindly prepare, certify and transmit to the clerk of the Circuit Court of Appeals for the Ninth Circuit at San Francisco a typewritten transcript of the record in the above-entitled cause, containing the following portions of the record in said cause, to wit (omitting all captions, indorsements, verifications, etc., excepting file-marks):

---

*Page-number appearing at foot of page of original certified Record.

1. Proof of claim of H. W. MacPhail, Assignee, and exhibits "A," "C," and "D," thereto attached; also exhibits "B–1" thereto attached, but copy only the list of signers to each of exhibits "B–2," "B–3," and "B–4," those exhibits being otherwise identical with exhibits "B–1."

2. Statement of evidence and order approving same.

3. Notice of filing of appellant's and petitioner's proposed statement of evidence.

4. Order of Referee in Bankruptcy disallowing priority to claim of H. W. MacPhail, dated October 6, 1915.

5. Objections to proof of claim of H. W. MacPhail.

6. Schedule A–3 of the schedules of the bankrupt filed December 9, 1914.

7. Findings and conclusions of the District Court and exceptions thereto filed June 12, 1916.

8. Order allowing claim, and exceptions thereto, filed in the District Court June 12, 1916. [2]

9. Demand and notice filed June 21, 1916.

10. Order shortening period of notice, dated June 12, 1916.

11. Order permitting creditor to take appellate proceedings in name of trustee.

12. Petition for appeal.

13. Assignment of errors.

14. Order allowing appeal.

15. Certificate of Comptroller of Currency directing appeal.

16. Praecipe for record.

17. Petition for review of Referee's order, filed October 21, 1915.

18. Minute entries showing filing of petition for rehearing of order of District Court on May 12, 1916, and denial thereof May 29, 1916.

OLDHAM & GOODALE,
Attorneys for Appellant and Petitioner.

(Filed July 10, 1916.) [3]

In the District Court of the United States for the Western District of Washington, Southern Division.

In the Matter of CREECH BROS. LUMBER COMPANY, Bankrupt.

Proof of Claim of H. W. MacPhail, Assignee.

At Raymond, in said District, on the 24th day of April, A. D. 1915, came H. W. MacPhail, of Pacific County of the State of Washington, and made oath and says:

That Creech Bros. Lumber Company, a corporation of the State of Washington, the above-named bankrupt, was at and before the filing of said petition and still is justly and truly indebted to said deponent in the sum of Fifteen Thousand One Hundred Seventy and 69/100 ($15,170.69) Dollars; that the consideration of said debt is as follows:

That on the 29th day of October, 1912, the said bankrupt was insolvent and indebted to divers persons and corporations in a large sum of money and it was impossible for said bankrupt to pay said indebtedness or operate its said mill plant, and on said

date the said bankrupt did make and execute a general assignment for the benefit of creditors assigning all of its property and assets to deponent, wherein among other things it was agreed that if the said deponent should operate the saw mill plant owned by the bankrupt in the City of Raymond that all sums advanced by him, or any sums which he might contract as indebtedness in the operation of said plant or in the purchase of logs or in the employment of labor for the operation of said plant should be a first and prior lien and should be paid prior to the payment of any sum or sums due the creditors of said bankrupt which said assignment is hereto attached, marked exhibit "A" and made a part hereof.

And each and all of the creditors entered into an agreement [4] or agreements which are identical in form, but, for the purpose of convenience, were executed in four separate instruments which were signed by each and all of said creditors, and in said instruments said creditors, and each of them, agreed that any sums advanced or contracted by said H. W. MacPhail in the operation of said plant should be paid prior to the payment of any sum due said creditors, which said instruments are hereto attached, marked exhibit "B–1," exhibit "B–2," exhibit "B–3" and exhibit "B–4," and made a part hereof.

That after the execution of said instruments aforesaid said deponent did as such assignee take charge of said plant and operate the same from and including the month of November, 1912, to and including the month of July, 1913, and during said time he contracted indebtedness and expended money to the amount of Thirteen Thousand Eight Hundred

Seventy-seven and 74/100 ($13,877.74) Dollars in excess of the amount which he received, and said corporation became indebted to him in said sum over and above all just credits and offsets which is itemized and shown on exhibit "C" hereto attached; and at the time of the filing of said petition there was due deponent as interest on said amount so advanced by him as assignee the sum of One Thousand Two Hundred Ninety-two and 98/100 ($1,292.98) Dollars as shown by an itemized statement hereto attached and marked exhibit "D," making a total due from said bankrupt to deponent at the date of the filing of said petition herein of Fifteen Thousand One Hundred Seventy and 69/100 ($15,170.69) Dollars.

That no part of said debt has been paid; that there are no offsets or counterclaims to the same and said deponent has not received any security for said debt except in so far as said debt is secured by reason of being a preferred claim.

That said assignment for the benefit of creditors made by said bankrupt to deponent on the 29th day of October, 1912, as aforesaid, was honestly made for the purpose of applying all of the assignors property to the payment of its debts, and such assignment was accepted [5] by deponent in good faith and he executed it intelligently and honestly for the best interest of said assignor and the creditors.

That priority in payment of the claim of deponent is claimed by virtue of the provisions of the Acts of Congress relating to bankruptcy and the statutes and laws of the State of Washington, and this deponent

claims a lien upon all of the property, assets, earnings and franchises of said bankrupt and the proceeds of sale thereof in the hands of the trustee, by virtue of the provisions of the statutes of the State of Washington, and also by virtue of the provisions of the Acts of Congress relating to bankruptcy.

H. W. MacPHAIL,
Creditor.

Subscribed and sworn to before me this 24th day of April, 1915.

[Notary Seal] C. E. MEREDITH,
Notary Public in and for the State of Washington,
Residing at Raymond in Said State. [6]

Exhibit "A"—Indenture, October 29, 1912, Between Creech Bros. Lumber Co. and H. W. MacPhail.

KNOW ALL MEN BY THESE PRESENTS: That this INDENTURE made and entered into by and between Creech Bros. Lumber Company, a corporation of the State of Washington, party of the first part, and H. W. MacPhail of Raymond, Washington, party of the second part, WITNESSETH: That,

WHEREAS, the first party has been operating a saw mill in the City of Raymond, Washington, and has become insolvent and is indebted to divers persons and corporations in the sum of $135,000, or thereabouts, which it is, at present, unable to pay in full, and

WHEREAS, it is now impossible for said first party, in its present financial condition to purchase logs, procure any credit or operate its plant, and

WHEREAS, the second party has signified his willingness to finance the operation of said plant, provided he could be amply and fully protected for all sums advanced or contracted by him, and provided the creditors would extend the time of payment of their several claims and desist from pressing said claims, in the courts or otherwise.

NOW, THEREFORE, for and in consideration of the sum of One Dollar each to the other in hand paid, and the mutual covenants and agreements herein made and contained, it is agreed by and between the parties hereto as follows:

That the second party be and he hereby is appointed sole and exclusive agent and representative of the first party, to take full, complete and exclusive charge of all of its property, real, personal, and mixed, of every kind, nature and description, wherever situated, and the said first party does hereby sell, transfer and assign unto the said second party, the above-described lands, real estate and personal property, in the State of Washington, and elsewhere, with full power and authority to sell and dispose of all of said real estate and personal property, including lumber, engines, locomotive, railroad iron and all other personal property of every kind, nature and description, and to use the money which he may obtain from the sale of said property for the [7] purpose of paying the indebtedness of said corporation, or the operating expense or any other purpose for which he may deem best, or for the purpose of enlarging, adding to or repairing said mill plant; also the right and authority to borrow money or

otherwise contract indebtedness in the name of said corporation, and to purchase logs, employ labor, purchase machinery, supplies and equipment for cash or on credit and to repair and operate said mill plant and to do all things in connection therewith as fully and completely as the first party could by and through its proper officers, duly authorized by the board of trustees and its stockholders.

It being distinctly understood by and between the parties hereto that any sums advanced by the second party or any sums which he may contract as indebtedness in the operation of said plant, or in the purchase of logs or the employment of labor for the operation of said plant shall be a first and prior lien and shall be paid prior to the payment of any sums now due the creditors of said corporation.

The second party agrees that he will, as agent, for and in the name of said corporation, purchase logs and employ labor and operate said mill for and in the name of said corporation so long as the same can be operated at a net profit of One Thousand Dollars or more per month and that from the profits derived from the operation of said plant, he shall first reimburse himself for any sums advanced by him and shall next pay and discharge any bills or indebtedness which he may contract in the operation of said plant, and the remainder, if any, he shall pay to the creditors *pro rata,* share and share alike, in proportion to their said claims until all of said claims, together with interest thereon at the rate of eight per cent per annum, have been fully paid, satisfied and discharged, and if there shall be any surplus, to pay

the same to the first party, its successors and assigns.

It being distinctly understood and agreed, however, that if said plant when operated in a good, diligent and business like manner, should not clear the sum of One Thousand Dollars per month, Net, that then the second party, may at his option, cease to operate said plant, and [8] sell and dispose of all of said real estate and personal property, and accounts and bills receivable for the purpose of first reimbursing himself for any sums advanced by him or any sums contracted by him in the operation of said plant, and second to pay the creditors of the first party in full or *pro rata,* and the fact that he may cease to operate said plant shall not be construed as terminating his rights under this contract until he has been fully paid for all sums by him advanced and until all sums by him contracted for have been fully paid, satisfied and discharged, and creditors have been paid in full or said assets have been all reduced to cash and the second party reimbursed, and the balance paid, *pro rata,* to the creditors of the first party.

And the first party hereby constitutes and appoints the second party, its attorney in fact, irrevocably with power of substitution, authorizing him in the name of the first party or otherwise, as the case may required, to hire and employ all managers, agents or other persons, and to do any and all acts, matters and things necessary to carry into effect the true intent and meaning of these presents, which the first party might do through its proper officers when duly authorized by resolution of its trustees and stockholders.

AND the second party hereby accepts there trusts and covenants to *anc* with the first party, to execute the same faithfully to the best of his ability.

The second party further covenants and agrees that if any creditor to which said corporation is indebted in the sum of more than One Thousand Dollars should so demand, that he will enter into a bond in the penal sum of Fifty Thousand Dollars with the party of the first part, conditioned that he will comply with the above and foregoing assignment and faithfully and honestly account for all sums received by him and in all manners faithfully and impartially execute said trust, said bond, if given, to be approved by the cashier of the Scandinavian American Bank of Astoria, Oregon, and the cashier or president of the Hayes & Hayes Bank of Aberdeen, Washington. [9]

IN WITNESS WHEREOF the said parties have hereunto set their hands and seals this 29th day of October, 1912.

CREECH BROS. LUMBER COMPANY. (Seal)

(Signed) By J. S. CREECH, Pres.
ALMA SMITH, Sec.
H. W. MacPHAIL.

Witnesses:

(Signed) MARTIN C. WELSH.

We, the undersigned stockholders, and being a majority in amount of the capital stock of said corporation, Creech Bros. Lumber Company, do hereby consent to and approve all of the terms and conditions of the above and foregoing agreement and ap-

prove the action of the president and secretary in executing said instrument in the name of and in behalf of said corporation, and we hereby agree to refrain from, and to waive any and all rights which we may have to prevent said agreement from being carried out and executed according to the true intent and meaning thereof.

F. E. CREECH—185 shares.
By MARTIN C. WELSH,
Attorney in Fact.
WELSH & WELSH—184 shares.
MARTIN C. WELSH—50 shares.
ALMA SMITH—70 shares.
D. H. SLATER—30 shares.
J. S. CREECH.
E. A. RUPERT.
E. F. MURRAY—50 shares.
W. E. BRADLEY—20 shares.
A. S. WATSON.
HARRY MURPHY—1. [10]

Exhibit "B-1"—Agreement October 21, 1912—Between Creech Bros. Lumber Co. and Creditor of H. W. MacPhail.

WHEREAS, Creech Bros. Lumber Company, a corporation of the State of Washington, which owns a saw mill at Raymond, Washington, is indebted in the sum of approximately $135,000, and

WHEREAS, its liabilities greatly exceed the resources of said corporation, and the company is therefore insolvent, and

WHEREAS, the stockholders and trustees of said corporation have agreed to make an assignment to

H. W. MacPhail for the benefit of all of the creditors of said corporation, and

WHEREAS, the said H. W. MacPhail has agreed to operate said plant as assignee and purchase logs for that purpose and otherwise finance the operation of the same, provided the same can be operated at a profit, and also provided the creditors will extend the time of payment of their several accounts and desist from pressing said accounts until they can be paid by the profits derived from the operation of said plant.

NOW, THEREFORE, we the undersigned creditors, in consideration of said assignment and of the agreement of the said H. W. MacPhail to finance said plant, severally agree that if said assignment is made and if the said H. W. MacPhail shall finance and operate said plant, that we will extend the time of payment of our several claims and desist from pressing said claim in the courts or otherwise, so long as said plant is operated at a monthly net profit of $1000 or more per month. It being understood that in the operation of said plant that the said H. W. MacPhail shall first pay the cost of operation and all sums contracted by him as such assignee, and all sums advanced by him, and thereafter shall pay to the creditors interest at the rate of eight per cent per annum on their said accounts, and shall pay the balance to the said creditors *pro rata,* share and share alike in proportion to their several claims, payments to be made quarterly, commencing on the 1st day of March, 1913, and continuing until all of said [11] indebtedness, including principal and interest is paid in full.

It is further understood and agreed that said assignee will if desired by any of the creditors issue to said creditors a certificate showing the amount due said creditors and the manner in which the same shall be paid and the rate of interest which the same shall bear.

Signed and dated this 21st day of October, 1912.

WILLAPA HARBOR STATE BANK,
By H. W. MacPHAIL, V.-Prest.
WILLAPA HARBOR IRON WORKS.
By JOHN E. GILCHRIST.
J. L. MYERS.
RAY EDY. & MACH. CO.
R. GERBER, Manager.
SILER MILL CO.
By W. S. GAIN, Secty.
G. E. GARRETT.
HENRY DISTON & SONS, INC.,
By D. W. JAUNKIN, Gen. Mgr.
PHILBRICK CUTTER HEAD COMPANY,
W. W. PHILBRICK.
WASHINGTON IRON WORKS.
By FRANCIS G. FRINK, Secy.
JOHN FINN METAL WORKS.
C. C. FINN, Secretary.
CARSTENS PACKING CO.
By W. C. PRATER, Sec. and Treas.
HAYES & HAYES BANKERS,
By W. J. PATTERSON, Cashier.
WEST COAST WIRE ROPE CO.
By J. T. GREGORY, President.
HART-WOOD LUMBER CO.
By T. H. HART.
WILLAPA LUMBER CO.
Per RALPH H. BURNSIDE, Vice-Pres.
DAVIS-SCOTT BELTING CO.
C. R. DAVIS, Secy.
SIMONDS MFG. CO.
E. E. TRESSLERS, Auditor.
W. P. FULLER & CO.
By C. B. WOODRUFF, Mgr.
PACIFIC TRANSPORTATION CO.
By T. H. BELL, Mgr.
LEWIS & REED,
By FLOYD L. LEWIS.
KALB & LARKIN LOGGING CO.
R. A. YOUNG, Mgr.
NIAGARA BOOM CO.
By R. A. YOUNG, Sec.
DWIGHT EDWARDS COMPANY.
A. O. STAFFORD, per Mgr.
SEATTLE HARDWARE CO.
C. S. WILLS,
By W. HORCHBROOK, Treasurer.
RAILWAY SUPPLY COMPANY.
By M. J. PIGATT, Sec. & Treas.
S. B. HICKS & SONS CO.
A. M. HICKS, Treas.

To the Creditors of Creech Bros. Lumber Company:

We have carefully read the attached agreement and having a personal knowledge of the situation believe that the plan as outlined is for the best interest of all concerned, and especially in view of the present good prices prevailing in the lumber market and the prospect for a continuation of this condition during the next few years. We also have every confidence in the ability of Mr. H. W. MacPhail and his associate Mr. C. H. Gilchrist to operate the plant to the best possible advantage, and can assure you that they will have our hearty co-operation and support.

SILER MILL CO.
By W. S. CAIN,
Secty.

COLUMBIA BOX & LBR. CO.
Per G. W. CHENEY, Mgr.

QUINAULT LUMBER COMPANY,
By EDWARD LOWE, Jr.,
Secty. and Treas.

WILLAPA LUMBER CO.
Per RALPH H. BURNSIDE,
Vice-Pres.

CRAM LUMBER COMPANY,
By E. A. GRAHAM, Treas.

SUNSET TIMBER CO.
By F. C. SCHORENSKY, Tr.

PACIFIC & EASTERN BOOM CO.
By RALPH H. BURNSIDE, Secy. **[13]**

PACIFIC AND EASTERN RAILWAY CO.
By W. S. CAIN, Pres.

Exhibit "B–2."

* * * * * * * * *

* * * * * * * * *

NASEL BOOM CO.
By GEO. S. LONG,
Prest.

CALDWELL MACHINERY CO.
By JOHN W. McFADON,
Treasurer.

STANDARD OIL CO.
By W. T. DAVIES,
Chief Clerk.

MEESE & GOTTFRIED COMPANY.
By V. C. LYOERSON.

CHEHALIS LUMBER COMPANY.
By BENJAMIN MOORE, Mgr. **[14]**

Exhibit "B–3."

* * * * * * * * *

* * * * * * * * *

CHAS. WIRKKALA.
JOHNSON BROS.
By OSWALD GUSTAFSON.
By MATT JOHNSON.
By FRANK JOHNSON.

SCANDINAVIAN–AMERICAN SAVINGS BANK.
J. M. ANDERSON,
Cashier.

CHAS. HERMAN. **[15]**

Exhibit "B–4."

* * * * * * * * *

* * * * * * * * *

BODERICK & BASCOM ROPE CO.
Jos. D. BASCOM,
Sec. & Tr.
CHEHALIS PRODUCE CO.
By I. P. CALLISON.
Dr. W. J. DOLLMEYER,
For Raymond General Hospital.
MARTIN C. WELSH.
NORTHERN PACIFIC RY. CO.
By L. B. DaPONTE, Atty. **[16]**

Exhibit "C."

ACTUAL CASH RECEIPTS OF CREECH BROS. LUMBER COMPANY BY H. W. MACPHAIL, ASSIGNEE.

Month.	Lumber Sales	Log Sales.	Camp Equipment.	Supplies, etc.	Dumping Logs.	Miscellaneous.	Assignee.	Totals.
1912.								
November	$1,759.77	$	$	$ 3.50	$			$1,763.27
December	3,034.99			2.50		220.80		3,258.29
January, 1913	10,450.04	42.50				12.65		10,504.84
February	11,428.50	159.14	250.00			52.35		11,889.99
March	17,795.75		100.00	3.75	309.50	60.00		18,269.00
April	11,490.20		156.50		260.81	165.00		12,072.51
May	22,658.21	87.33	185.00	7.50	289.84	62.50		23,290.38
June	16,117.70	666.00	2,500.00	62.94	359.52	84.40		19,790.56
July	23,187.85		2,782.99		901.50			26,872.34
August	7,702.79				308.78	26.30	2,000.00	10,037.87
September	7,006.46			7.55	342.80	43.00	20,363.11	27,762.92
October	1,905.30	2,226.84	3.50	29.00	911.75			5,076.39
November	2,114.73			69.60	261.92			2,446.25
December	511.64	233.97		55.00	50.00			850.61
January, 1914	1,064.73	100.31		58.25		2.74		1,226.03
February	2,889.20		1,757.53	55.00	53.55	56.32		4,811.60
March	8.40			46.00		35.00	319.97	409.37
April	1,067.02			58.25				1,125.27
May	17.70			45.65	313.89			377.24
June				80.00	515.70			595.70
July	1,171.93							1,171.93
	$143,382.91	$3,515.74	$7,735.52	$584.49	$4,879.56	$821.06	$22,683.08	$183,602.36

ACTUAL CASH EXPENDITURES OF CREECH BROS. LUMBER COMPANY BY H. W. MACPHAIL, ASSIGNEE.

Month.	Logs.	Old Accts.	Assignee.	Pay-roll.	Supply Exp.	Interest.	Insurance.	Taxes.	Work-Comp.	Ms-Fees.	Totals.
1912.											
Nov.		$ 48.67	$	450.70	213.93	$ 542.47	$ 382.65	$	$	$28.99	$ 1,667.41
Dec.	248.80	49.70		1,604.05	208.35	482.98	115.02		510.07	.48	3,219.45
Jan. '13	2,516.26	75.23		3,930.70	632.31	847.75		820.14		3.73	8,826.12
Feb'y.	2,101.53	148.11		4,139.25	714.74	329.46	969.30			31.16	8,613.55
Mar.	7,408.02			5,367.81	338.59	1,856.98	494.62	852.72		38.84	16,357.58
Apr.	6,038.32	72.20		5,546.30	634.45	573.33	276.93		182.92	50.81	13,375.27
May	9,851.95	3,500.00		5,917.98	274.20	706.69		246.08		51.73	20,548.63
June	13,108.29	10,051.84		4,788.76	431.83	1,902.27				74.97	30,357.96
July	17,342.84			5,793.83	834.37	86.68				47.67	24,105.39
Aug.	7,241.97			4,846.57	316.05	39.31			337.50	93.43	12,874.83
Sept.	23,762.20			581.00	1,638.43	805.79				67.75	26,855.17
Oct.	1,744.34		2,000.00	525.50	38.10	89.64				4.09	4,401.67
Nov.	1,741.49		679.72	453.72	121.50		140.91	246.07	116.28	121.96	3,621.28
Dec.				419.35	243.60				13.01	14.88	690.84
Jan. '14				486.90	77.82	2.50	380.96				948.18
Feb.	31.73		4,633.75	316.50	79.95						5,061.93
Mar.				365.00	74.40					18.00	457.40
Apr.			319.97	343.98	54.65		428.87		11.82		1,157.29
May				241.05	76.25						317.30
June				561.25	24.50	5.95				15.00	606.70
July			1,171.93								1,171.93
	$93,137.74	13,945.75	8,805.37	46,859.83	7,028.02	$8,271.80	3,189.26	2,165.01	1,171.61	663.49	185,235.88

Exhibit "D."

INTEREST DUE H. W. MACPHAIL, AS ASSIGNEE.

B/P #175.	$11,679.72	9/8/13 to 11/26/13	2 mo. 18 da.....	$202.45
	11,000.00	11/26/13 to 2/14/14	2 mo. 18 da.....	190.67
	10,725.19	2/14/14 to 7/2/14	4 mo. 18 da.....	328.80
	9,553.26*	7/2/14 to 8/27/14	1 mo. 25 da.....	116.76
B/P #185.	8,683.39	9/28/13 to 2/19/14	4 mo. 21 da.....	272.08
	5,000.00	2/19/14 to 2/20/14	—— 1 da.....	1.11
	4,324.45*	2/20/14 to 8/27/14	6 mo. 7 da.....	179.70
B/P #194.	319.97	3/31/14 to 4/17/14	—— 16 da.....	1.41
				$1,292.98

Principal Due H. W. MacPhail as Assignee.....	13,877.71
Interest Due H. W. MacPhail as Assignee.....	1,292.98
	$15,170.69

[18]

Statement of Evidence.

The evidence both before the Referee in Bankruptcy and before the District Court upon which the objections of A. R. Titlow, a creditor of this estate objecting in the name of the trustee in bankruptcy to the allowance of H. W. MacPhail's preferred claim, were heard, is as follows:

Testimony of B. H. Lewis, for Claimant.

B. H. LEWIS, a witness on behalf of the claimant, H. W. MacPhail, being duly sworn, testified as follows:

That he resided at Raymond, Washington, and had been actively engaged in the lumber business for about thirteen years and had been engaged in the manufacture of lumber, the buying of logs, and the selling of lumber; that he had had the management of certain sawmills, including that of Creech Brothers Lumber Company; that he was manager of

(Testimony of B. H. Lewis.)

the Creech Brothers Company for about two years, and had been manager for sixty days prior to the time the property was assigned to H. W. MacPhail; that he continued in its management after that assignment until the receiver was appointed in the State court; that during the time he managed it for MacPhail the plant was not engaged in the logging business, but bought the logs which it used; that they sold a limited amount of lumber at Raymond, also a small amount for rail shipments; that they entered into various contracts to furnish lumber and took orders for lumber, as was customarily done. That the mill was operated a little less than seven and one-half months while MacPhail [19] was assignee; that he endeavored to operate as economically as he could the same as in the operation of any other mill.

Referring to exhibit "C" attached to MacPhail's proof of claim, witness stated that he prepared that and that it showed the true state of affairs of the company; that it was prepared during the latter part of 1914, in November or December; that the figures were all taken from the books of the company; that the statement showed that MacPhail expended more money than he derived from the operation of the plant to the extent of between $13,000 and $14,000; that this $13,000 difference was practically all used in paying log drafts; that as for the purchase price of logs that not any of it to speak of was used in paying for labor; that there might have been a small proportion of it; that the statement showed the

(Testimony of B. H. Lewis.)

amount of money paid out by MacPhail for labor during the time he operated the plant, which was $46,859.03; that $7,028.02 was paid for supplies; that these expenditures covered not only the 7½ months before mentioned, but the entire cost of the mill while he was in charge from the time the original contract was signed, to the time the receiver was appointed, that is, 18 months or more.

That MacPhail took possession of the plant as assignee about November 1, 1912. Witness said he did not remember the date the receiver was appointed, but thought it was July 15 or 19, 1914. Witness stated that he was manager for MacPhail all the time MacPhail held the plant as assignee; that exhibit "C" is the statement from the books covering that property, showing all the receipts and disbursements during that period; that during that period MacPhail paid out for interest $8,271.80, for insurance, $3,189.46, and for taxes, $2,165.01; that some of these taxes were due at the time MacPhail took charge.

That MacPhail made a profit of $1,000 per month during part of the time; that at the first they started the plant and ran a few days in December, 1912, but did not have a satisfactory log supply, and they ran only part of the month of January, 1913, for the same reason. **[20]** About the first full month's run was had in February. From that time until June 1, the operation of the plant showed a profit that exceeded $1,000 per month. That they operated the plant through the month of June, and about three weeks

in July, he supposed, and a few days in August, 1913; that the reason they continued the operation of the plant when it was not making $1,000 or more per month was that the market broke and began to decline about the month of June. They then decided it was impossible to operate and make the thousand dollar profit, and during that month stopped taking orders that would prolong the operation. At that time they had orders for some business known as "giant business" signed up. They had orders for one-half million feet or more, which was a special size timber stock that had to be contracted for some little time in advance. The vessels could not take it very fast. They had contracts booked up for two months before they began to cut. It was impossible to place that with other mills for the same price. The price was all right, but other mills on Willapa Harbor had taken all they could handle; that their mill handled its proportion, but they could not stop work on this contract without getting up against a serious proposition of failing in the contract and had to run the plant until the contract was completed, which took thirty days at least of actual operating days. After they had determined it was not profitable to run they had to shut down as soon as they could. In cutting the stuff referred to, they could not apply more than 30 per cent. on that order and were compelled to sell the other 70 per cent. at a loss. There was a profit in filling the order provided there was a demand for other grades of lum-

(Testimony of B. H. Lewis.)

ber; that the grade covered by this contract was obtained in the hearts of logs. The great loss was incurred where they were not able to continue to operate at a profit, occasioned by the decline in price of uppers or clear, which in 90 days' time amounted to from $8 to $10 per thousand. That there was no question that they lost money on the [21] logs that they bought to fill that order; that in the operation of a mill plant it is customary to contract for orders as mentioned, that they are all placed that way; that it was impossible to place an order for three or four million feet for less than from 60 to 120 days; that the order referred to was placed with the Robert Dollar Steamship Company of San Francisco; that if the market had remained as it was when they took the order in question they certainly would have made a profit.

On cross-examination by counsel for the objecting creditor, the witness stated that he determined that the mill was operated at a profit by taking an inventory the first of each month; that in May the books of the company showed a profit of $7,000; that the profit shown did not take into consideration depreciation of the plant and equipment, for the reason that all repairs and replacements were charged direct to operating expenses and not to the plant; that there were small additions here and there not charged to the plant, but charged as operating expenses. In response to a question as to whether on the whole the plant gained or lost, the witness said it all depended upon which date you took that. On

(Testimony of B. H. Lewis.)

the first of June, the plant had gained. Looking at it from a later period there would be a loss, of course; that he could not say how much; that as it turned out under bankrupt conditions the net result of MacPhail's administration was not beneficial to the estate of the bankrupt; that some of the general indebtedness of the company was paid during that period; about 10% of the old indebtedness was paid, together with interest and some certain items that had to be paid in full; that he thought $18,000 or $20,000 was shown on the statement as being paid on the old indebtedness contracted before MacPhail took hold; that the $13,000 shown as a cash expenditure in exhibit "D" attached to the proof of claim was what he referred to; that this was paid on old accounts. **[22]**

The witness explained the next item, "Assignee $8,805.37" by stating that that was money advanced by MacPhail; that at the time MacPhail took hold the firm had no credit whatever, that he had to go out practically and with his own name buy anything for other than cash; that he had to give his personal guarantee in order to buy raft logs. That MacPhail received no compensation for his services.

In response to questions on cross-examination by counsel for Hayes & Hayes, creditors of the estate, also appearing in opposition to the allowance of MacPhail's claim, the witness stated that a statement on the condition of the company was made out after MacPhail took possession and was mailed to creditors along toward January 1, 1913; that that state-

(Testimony of B. H. Lewis.)

ment was not correct as other indebtedness had to be added on afterwards; that the statement showed that there was paid on old indebtedness $13,945.75, which was the correct amount; that the amount of indebtedness of the concern was not increased by the amount of this claim, for which MacPhail was now claiming priority; that the $13,000 for which MacPhail claims priority was incurred by him in operating expenses, that it was created against the estate; that the sum paid on old accounts was in the nature of a dividend, that all creditors got a part of it, the amount with interest being paid on their claims. That during MacPhail's administration of the plant he bought $93,000 worth of logs. The amount of the payroll during this period was about $40,000. That the logs were bought from any one who had logs to sell on the Harbor; that a very small part of them were bought under contract. That so far as he knew MacPhail did not pay more than the market price for logs. That the order to the Robert Dollar Lumber Company which they were obliged to run in order to fill was between half a million and a million, could not say the exact amount, that it was long timber, most of it, that he had never made any estimate of just how much money they lost while operating the plant. [23]

On further examination by counsel for the objecting creditor Titlow, witness stated that the amount of cash advanced in excess of amounts received by MacPhail was about $13,000, as shown on the statement; that this sum was made up of various advances

by MacPhail which amounted in all to $22,683.08, which were advanced by MacPhail to take up log drafts and the like; that the expenditures in the third column (referring to Exhibit "C" attached to the proof of claim) showed the months in which the payments were made back to MacPhail as assignee; that the difference in the total of $8,805.37, and the total amount advanced represents the amount which the company still owes MacPhail.

On redirect examination by counsel for claimant, witness stated that the $13,000 which he said MacPhail had paid off were only individual accounts and did not include taxes and insurance; that this was a dividend paid to all the creditors amounting to 10%; that the statement marked exhibit "C" was correct; that he never heard of MacPhail's being interested in any way in the companies from which he bought the logs; that they purchased logs at market prices; that at the time he took charge of Creech Brothers' mill as manager for MacPhail the books were in such shape it was absolutely impossible to tell what they owed any one, that it really took five or six months to determine; that from January 1st, when the statement of the condition of the plant was put out they had to make corrections; that it turned out afterwards that they did not have all the indebtedness listed in that January, 1913, statement; that the books of the company did not show that, and they knew nothing about it, that this indebtedness appeared afterwards, but the items which appeared in the statement were correct so far as they went.

(Testimony of B. H. Lewis.)

In regard to the overhead expense of the plant while MacPhail was in charge, witness stated that interest on the indebtedness amounted [24] to $1,000 per month, the taxes were $125 per month, insurance $190 per month, and the watchman about $75 per month; that at the time he closed the plant for MacPhail it was in better condition than when he took charge; that he improved its condition while he operated it.

Testimony of H. W. MacPhail for Claimant.

H. W. MacPHAIL, the claimant, being duly sworn as a witness for himself testified as follows:

That he was the assignee named in the assignment from Creech Brothers dated October 29, 1912, and was the claimant in this proceeding; that the proof of claim in question was his and the exhibits attached thereto were the original papers; that after receiving this assignment he took possession of and operated the plant; that exhibits "B–1," "B–2," "B–3," and "B–4" attached to the proof of claim are the consent of the creditors to his operating the plant and taking charge and preventing their suing. That at the time these consents were obtained the United States National Bank of Centralia was aware of the fact, and that that bank aided or assisted in getting them signed; that the officers of the bank who so assisted were Mr. Dysart and Mr. Gilchrist, the vice-president. That Mr. Gilchrist or Mr. Dysart called upon the Scandinavian American Bank of Astoria, a creditor of the bankrupt, and procured that bank to sign.

(Testimony of H. W. MacPhail.)

That Mr. Gilchrist went with the witness to confer with that bank and persuaded it to give its signature. That witness and Mr. Gilchrist also discussed the matter with Hayes & Hayes, bankers of Aberdeen, creditors of the estate, and Hayes & Hayes signed the consent. **[25]**

That at the present time the United States National Bank and its receiver was a creditor of Creech Brothers Lumber Company; that the United States National Bank received the paper of Creech Brothers Lumber Company which it now held about the middle of the year 1913 or the early part of 1914. He was not sure as to the date but thought it was in the early part of 1914. He was sure it was after he had taken charge of Creech Brothers' plant as trustee. That at the time the United States National Bank took that paper it knew of these waivers signed by the creditors as before stated. That his claim for $15,170.69 was made up of two items, principal and interest; that the principal charge without the interest was in the neighborhood of $13,000. That the way the company became indebted to him was that when he took charge of it, it had no funds on hand, and he agreed to furnish funds for the operation of the plant. These funds were advanced to Mr. Lewis for different things along the line of operation, for the purchase of logs, etc.; that the statement exhibit "C" so far as he knew was true and correct; that the principal sum, $13,877.74, as shown by exhibit "D–1," was true and correct; that was the principal amount for which the company was indebted to him

(Testimony of H. W. MacPhail.)

and there was interest due on that. That during the time he operated the plant he operated it honestly, efficiently, and the best he could for the interests of the company; that he did not privately or otherwise profit out of the transaction; that he had no interest in any of the companies from whom logs were purchased; that Mr. Lewis' statement as to the reason why the company was not closed down immediately was correct.

On cross-examination by counsel for objecting creditor Titlow, Receiver, counsel, referring to the expression in the proof of claim, "contracted indebtedness and expended money to the extent of $13,877.74," asked: [26]

> "Q. I thought you paid out in excess of amounts received from this company $13,877.74, that you actually expended money. This seems to indicate there might be simply an assumption of liability. We have no knowledge whether you paid them or not. Perhaps some of them are still claims against the company?"
>
> "A. That is correct."

Witness stated that he was a banker there at Raymond and his bank (the Willapa Harbor State Bank) gave the money and he settled with the bank when he got through, and that was the reason he had this claim against the company. That at the time the assignment was made to him the Creech Brothers Company had various real and personal property, which was all situated in Pacific County, Washington; that they had no property outside of the State

(Testimony of H. W. MacPhail.)

of Washington; that the assignment to him from Creech Brothers Company was not recorded; that he did not sell any part of the fixed property of the company, he simply sold lumber in the ordinary course of business; that he did not sell any of the real property or any part of the plant or machinery.

On redirect examination witness stated that after he discovered the plant was not paying he closed it and notified each of the creditors and stockholders by letter of a meeting; that after sending out those letters he met with the creditors and stockholders and asked them to relieve him of the assignment, but that he did not think they relieved him, that he thought he kept the position until the receiver was appointed in the State court.

Counsel for claimant here offered in evidence the files in the bankruptcy cause of Creech Brothers Lumber Company, Bankrupt. The portions thereof material to this controversy are specifically referred to herein.

On recross-examination witness stated that it was a fact that taking his trusteeship as a whole but not any particular part of the operation the company lost money during that time.

From the files in the bankruptcy cause introduced in evidence, it appeared that a petition in involuntary bankruptcy was filed against Creech Brothers Lumber Company on August 27, 1914, by Siler Mill Company, Raymond Foundry & Machine Company, C. P. Bell and S. F. [27] Bell, copartners as Bell Brothers Hardware Company, the act of bankruptcy

alleged being the appointment of a receiver for the bankrupt by the Superior Court of the State of Washington for Pacific County on July 28, 1914, in a cause therein entitled John L. Myers vs. Creech Brothers Lumber Company; that thereafter adjudication of bankruptcy was made, and on December 28, 1914, Robert G. Chambers was duly appointed trustee in bankruptcy for the Lumber Company and is still the duly appointed, qualified and acting trustee.

It further appeared that the plant and other property and assets of the bankrupt estate had been sold by the trustee in bankruptcy and that the amount realized therefrom is somewhat less than the preferred claim asserted by claimant; that the total indebtedness proved and allowed against the bankrupt is approximately $137,000.

It was further admitted by counsel on both sides that at the time of and before the assignment to MacPhail and during the period covered by the transactions in question, one C. S. Gilchrist was vice-president of the United States National Bank of Centralia and president of the Willapa Harbor State Bank; that the United States National Bank of Centralia is a national banking association organized under the laws of the United States; that it became insolvent on September 21, 1914, and the objecting creditor A. R. Titlow is its duly appointed, qualified, and acting receiver. That this bank was not a creditor of the Lumber Company at the time of the assignment to MacPhail. The proof of claim filed by the objecting creditor Titlow, receiver, as it ap-

peared from the files in the bankruptcy court introduced in evidence was for money advanced as evidenced by seven promissory notes of the bankrupt for various amounts, aggregating with the interest due thereon to the time of the filing of the petition, the sum of $16,255.75. Schedule A–3 of the schedules of the bankrupt filed December 9, 1914, being a list of the creditors of the bankrupt and the amounts of their claims, was referred to by counsel and is made a part of this statement of evidence.

(Filed July 6, 1916.) [28]

Order Approving Statement of Evidence.

The appellant and petitioner for revision having duly filed herein and given due notice to the claimant, H. W. MacPhail, of such filing on the 6th day of July, 1916, and having designated the 17th day of July at 10 A. M. at the courtroom of the above-named court at Seattle as the time and place for presenting such statement of evidence for approval, and the appellant and petitioner having appeared at that time and place and asked that such presentation be continued to this date, and the claimant not appearing, and it appearing that no objections or amendments have been proposed by the claimant, and that the proposed statement of evidence is in form and contents satisfactory to both the claimant and the appellant and petitioner for revision and that the same is true, complete and properly prepared, it is

ORDERED that said statement be and it is hereby approved and that the same become a part of the

record both for the purposes of the appeal and of the petition for revision.

Done in open court this 18th day of July, 1916.

JEREMIAH NETERER,
Judge.

(Filed July 18, 1916.) [29]

Notice (of Filing of Proposed Statement of Evidence).

To H. W. MacPhail and Messrs. Welsh & Welsh, and M. M. Richardson, His Attorneys:

You will please take notice that we have on this 6th day of July, 1916, lodged in the office of the clerk of the above-named court, for your examination, a statement of the evidence herein proposed by the appellant and petitioner A. R. Titlow, Receiver of the United States National Bank, acting in the name and stead of Robert G. Chambers, Trustee in Bankruptcy herein; such evidence to be included in the record both on appeal and upon petition for review in this cause.

And you will please take notice that on the 17th day of July, 1916, at 10 o'clock A. M., at the courthouse of the above-named court in Seattle, Washington, we will ask the Court or Judge to approve the statement hereinbefore mentioned, a copy of which is herewith served upon you.

OLDHAM & GOODALE,
Attorneys for Appellant and Petitioner.

(Filed Jul. 10, 1916.) [30]

Order Disallowing Priority to Claim of H. W. MacPhail.

This cause duly came on for hearing on the 14th day of July, 1915, upon the objections of A. R. Titlow, as receiver of the United States National Bank of Centralia, Washington, one of the creditors of this estate, to the claim of H. W. MacPhail (such objections being filed on behalf and in the name of the trustee of this estate upon leave of court theretofore obtained after the refusal of the trustee in bankruptcy upon demand to make or file such objections) and was argued by counsel, thereupon, upon consideration thereof, it was

ORDERED as follows:

1. That the claim of H. W. MacPhail for priority of payment in the sum of $15,170.69, or any other sum, be disallowed.

2. That this order is made without prejudice either for or against H. W. MacPhail's right to file and prove a general claim against this estate or the trustee's right to recover any preferential payments from the bankrupt to H. W. MacPhail.

Done in open court this 6th day of October, 1915.

R. F. LAFFOON,
Referee in Bankruptcy.

(Filed Oct. 6, 1915.) [31]

Objections to the Proof of Claim of H. W. MacPhail.

A. R. Titlow, as receiver of the United States National Bank of Centralia, Washington one of the

creditors of this estate with leave first obtained from this court to file objections to the claim of H. W. MacPhail herein, in the name and for the trustee of this estate and for the benefit of this estate and its creditors, objections to the claim of said H. W. MacPhail heretofore filed in the sum of $15,170.69 and as grounds for said objections states:

I.

Said claim upon its face and in connection with the exhibits attached thereto does not entitle said claimant to priority, preference or security over the claim of general creditors in this estate.

II.

Said claim upon its face and exhibits attached thereto show that it is not entitled to any priority in payment over the claim heretofore filed on behalf of the United States National Bank of Centralia.

III.

Not only should said claim be not allowed as a secured or prior claim, but said claim upon its face shows that it is not entitled to any standing in this estate as a general claim or as any claim at all.

IV.

If allowed at all as a general claim said claim together with the exhibits attached thereto show that the same should not be allowed in any greater sum than $6,000.

BAUSMAN OLDHAM & GOODALE,
Attorneys for A. R. Titlow as Receiver of U. S. National Bank of Centralia, a Creditor herein, and Filing These Objections on Behalf of and in the name of the Trustee of This Estate. [32]

Objections to the Claim of MacPhail.

A. R. Titlow, as receiver of the United States National Bank of Centralia, with the leave of court first obtained, for and on behalf of Robert Chambers, as trustee hereing, and in the name of trustee does hereby file objections to the claim of H. W. MacPhail and for grounds of said objections and exceptions to the aforesaid H. W. MacPhail says:

I.

As claim of H. W. MacPhail is not entitled to preference or priority in payment under Acts of Congress relative to bankruptcy estates said claim, if allowed at all, is a general claim against this estate.

A. R. TITLOW,

On Behalf of Robert Chambers as Trustee of the Estate of Creech Bros. Lumber Company, Bankrupt.

(Verified.)

(Filed May 22, 1915.) [33]

SCHEDULE A–3.

CREDITORS WHOSE CLAIMS ARE UNSECURED.

Willapa Harbor State Bank, Note Dated 8/17/13	$2000.00
Willapa Harbor State Bank, Note Dated 8/17/13	2000.00
Willapa Harbor State Bank, Note Dated 8/19/13	2500.00
Willapa Harbor State Bank, Note Dated 8/29/13	8540.00

Willapa Harbor State Bank, Note Dated 8/31/13	7000.00
Willapa Harbor State Bank, Note Dated 8/31/13	6546.00
Willapa Harbor State Bank, Note Dated 9/14/13	1500.00
Willapa Harbor State Bank, Note Dated 9/16/13	2000.00
Willapa Harbor State Bank, Note Dated 9/16/13	2000.00
Willapa Harbor State Bank, Note Dated 9/16/13	2000.00
Willapa Harbor State Bank, Note Dated 9/16/13	2000.00
Willapa Harbor State Bank, Note Dated 9/16/13	2000.00
Willapa Harbor State Bank, Note Dated 9/22/13	3500.00
Willapa Harbor State Bank, Note Dated 11/16/13	2500.00
Willapa Harbor State Bank, Note Dated 5/4/14	2000.00
Willapa Harbor State Bank, Note Dated 5/4/14	2000.00
Willapa Harbor State Bank, Note Dated 5/4/14	2000.00
Willapa Harbor State Bank, Note Dated 6/14/14	3000.00
Willapa Harbor State Bank, Note Dated 6/14/14	3000.00
M. C. Welsh, Trustee, Note Dated 9/17/13..	7000.00
M. C. Welsh, Trustee, Note Dated 9/17/13..	2000.00

H. W. MacPhail, Trustee, Note Dated 9/8/13 ..... 9553.26
H. W. MacPhail, Trustee, Note Dated 9/28/13 ..... 4357.42
John S. Creech, Note Dated 10/12/12..... 385.29
Floyd E. Creech, Note Dated 2/25/13..... 1268.72
Hayes & Hayes Bank, Note Dated 6/1/13.. 9000.00
Hayes & Hayes Bank, Note Dated 6/1/13.. 9000.00

CERTIFICATES OF INDEBTEDNESS.

Johnson Bros. 1st Natl. Bank, Astoria.... 900.00
Johnson Bros. Scandinavian-Am. Bank, Astoria 2500.00
Johnson Bros. Scandinavian-Am. Bank, Astoria 335.00
Johnson Bros. Scandinavian-Am. Bank, Astoria 2500.00
Chas. Neimi, Scandinavian-Am. Bank, Astoria 900.00
Johnson Bros. Scandinavian-Am. Bank, Astoria 2000.00
Chas. Wirkkala, Scandinavian-Am. Bank, Astoria 1450.00
Nasel Boom Company, Tacoma..... 1212.90
Chehalis Lumber Company, U. S. Natl. Bank, Centralia 3338.27
H. Syverson, U. S. Natl. Bank, Centralia.. 967.59
Niagara Boom Company, Astoria..... 184.91
" " " " 103.95
" " " " 150.48
" " " " 245.58
" " " " 137.30

Kalb & Larkin Logging Company, Astoria.	3661.34
" " " " "	680.51
Raymond General Hospital, Raymond.....	234.00
Washington Iron Works, Seattle.....	901.09
W. P. Fuller & Company, Portland.....	774.28
[34]	
W. S. Applegate, Raymond.....	138.51
West Coast Wire Rope Company, Tacoma..	646.82
Railway Supply Company, Seattle.....	276.66
Broderick & Bascom Rope Company, St. Louis	672.38
S. B. Hicks & Sons Company, Seattle.....	123.70
Nettleton & Company, South Bend.....	98.00
G. E. Garrett, Raymond.....	194.78
Henry Disston & Sons, Seattle.....	312.55
P. W. Rhodes, South Bend.....	226.00
W. R. Johnson, Raymond.....	223.95
Seattle Hardware Company, Seattle.....	435.81
Hart-Wood Lumber Company, San Francisco, Cal.	2275.00
Messe & Gottfried Company, Seattle.....	159.71
John Finn Metal Works, Seattle.....	115.01
Simonds Manufacturing Company, Portland	482.45
Caldwell Machinery Company, Tacoma....	108.00
Philbrick Cutter Head Company, Seattle..	97.38
Calhoun, Denny & Ewing, Seattle.....	427.57
Pacific Transportation Company, South Bend	918.12
Bell Bros. Hardware Company, Raymond..	72.35
Chas. Herman, South Bend.....	150.01
Standard Towboat Company, Raymond....	30.25

Raymond Foundry & Machine Company, Raymond	235.66
John L. Myers, South Bend	181.21
James Churchill Glove Company, Centralia	126.45
Lewis & Reed, Raymond	342.00
Davis-Scott Belting Company, Portland	219.46
Carstens Packing Company, Tacoma	720.42
" " " "	100.69
Standard Oil Company, Tacoma	206.17
Chehalis Produce Company, Aberdeen	443.52
Dwight Edwards Company, Portland	67.05
Siler Mill Company, Raymond	233.19
Welsh & Welsh, Raymond	191.87
Portland Machinery Company, Portland	68.64
Allis-Chalmers Manufacturing Company, Seattle	53.55
Great Western Smelting Company, Seattle	54.81
Mill & Mine Supply Company, Seattle	28.58
E. C. Atkins & Company, Portland	31.50
South Bend Mills & Timber Company, South Bend	26.04
Case Shingle & Lumber Company, Raymond	46.62
Martin C. Welsh, Raymond	721.15
Willapa Harbor Iron Works, South Bend	416.18
Mrs. Bertha C. Stringer, Men*lc*	509.57
Benson Office Supply Company, Aberdeen	32.00
Raymond Livery & Garage, Raymond	22.73
Transit Towboat Company, South Bend	19.60
B. F. Armstrong, Westport	29.63

H. H. Powelson, Raymond..... 40.45
Northern Pacific Railway Company,
Tacoma 360.00

Total $137,531.48

CREECH BROS. LUMBER COMPANY,
By JOHN S. CREECH,
President.

(Filed Dec. 9, 1914—10:08 A. M.) [35]

Findings of Fact and Conclusions of Law.

This matter came on before the Court on the 25th day of March, 1916, on petition of H. W. MacPhail, for review of the order of the Referee in Bankruptcy disallowing the claim of the petitioner as preferred. This matter was presented orally and briefs were thereafter filed and the Court on the 28th day of April, 1916, filed its memorandum decision overruling the Referee and allowing the claim as preferred, and the Court now, all parties appearing, and A. R. Titlow, the Receiver of the United States National Bank of Centralia, a creditor, appearing as such in the name of the Trustee, on motion for final order, makes the following findings of fact and conclusions of law:

I.

That on and prior to the 21st day of October, 1912, the bankrupt was a corporation of the State of Washington, engaged in manufacturing lumber, and at such time its liabilities greatly exceeded its assets, and on said date entered into an agreement with H.

W. MacPhail, wherein it appointed MacPhail irrevocably its attorney in fact, to do various things with relation to such business, and which it is claimed by attorneys for MacPhail to be an assignment for the benefit of creditors. The agreement is marked exhibit "A" and is attached to the proof of claim of MacPhail and is made a part of this finding. There is also attached to petitioner's proof of claim exhibits "B–1," "B–2," "B–3" and "B–4," being executed by then existing creditors of the bankrupt.

II.

Upon the execution of such instrument by the bankrupt and existing creditors of the bankrupt, MacPhail took possession of the assets of the bankrupt and began the operation of its mill plant, and continued such operation until July or August, 1913, and retained possession of all of the assets until delivered to the Receiver appointed **[36]** by the State Court, which appointment was made about the 30th day of July, 1914.

III.

That on August 27, 1914, a petition in involuntary bankruptcy was filed against the above bankrupt and thereafter adjudication was made, and on December 28, 1914, Robert G. Chambers was duly appointed Trustee in Bankruptcy for such corporation and qualified and is still acting.

IV.

That upon commencing the operation of the mill plant, MacPhail entered into a contract in which he agreed to furnish certain select timber known as "giant timber," to produce which only about thirty

per cent of the total cut of the log could be used, and the remaining seventy per cent, was manufactured into lumber for the market, and a profit in excess of $1,000 a month was realized in the operation of the mill for some five or six months; but the general lumber market "broke" after six months' operation. A number of orders had been taken for the "giant timber" prior to this time, and it was necessary to continue the operation of the mill until these orders were filled, and it was found that the plant could not be operated at a profit.

V.

Upon realizing that the plant could not be operated at a profit, MacPhail notified all of the creditors and stockholders of the bankrupt by letter and requested to be relieved of the operation of the so-called assignment or agreement, but he was not relieved.

VI.

That during the operation of the mill MacPhail paid something over ten per cent of the claims of the creditors; paid over $3,000 in insurance; over $2,000 in taxes; and upon the mill [37] being closed down, after having paid for all of the logs amounting to over $93,000 and for labor amounting to over $46,000, together with other items necessarily disbursed, he found that he had expended $13,877.74 more than he had received.

VII.

That the United States National Bank of Centralia at all times was a corporation organized under the national banking laws, with its principal place of

business at Centralia, Washington; that it became insolvent on the 21st day of September, 1914, and thereafter A. R. Titlow was appointed and is now the duly qualified Receiver of said bank.

VIII.

That at the time of the execution of the agreement referred to as exhibit "A" in finding No. 11 the United States National Bank was not a creditor of the bankrupt company, but subsequently became such, and the Receiver has proved its claim in the sum of $16,255.75.

IX.

That at the time of the making of the agreement exhibit "A," one Charles H. Gilchrist, the Vice-President and Manager of the bank, and George Dysart, one of the other officers of the bank, were instrumental in procuring the signature of the bankrupt corporation and of the creditors to the agreement, exhibit "A," and at the time the United States National Bank procured the notice on which its claim is founded and which makes it a creditor, it knew that McPhail was in possession of the mill and all of the property of bankrupt, and of the waivers signed by the creditors, and had full notice and knowledge of all of the facts relating thereto. [38]

X.

That the agreement exhibit "A" was never filed for record in the auditor's office of Pacific County where the property covered by it is situated.

XI.

That neither the trustee nor any creditor other than the Receiver aforesaid has protested the claim

of MacPhail as a preferred claim.

The foregoing findings are based upon the following, which, (aside from an admission by counsel for both sides as to Gilchrist's relations with the Willapa Harbor State Bank), constitute all of the evidence before the Court on this hearing for review:

1. Referee's certificate of review.
2. Transcript of testimony on hearing before Referee.
3. Petition for review of Referee's order.
4. Order disallowing priority to claim of H. W. MacPhail.
5. Proof of claim of H. W. MacPhail, assignee, and exhibits "A," "B-1," "B-2," "B-3," "B-4," "C" and "D" thereto attached.
6. Proof of claims of creditors filed in the Bankruptcy Court.

and as conclusions of law the Court finds:

I.

That MacPhail's claim for the money advanced by him is preferred.

II.

That the United States National Bank and its Receiver are estopped to object to the allowance of such claim as a prior claim.

III.

That MacPhail is entitled to the allowance of his claim as preferred in the sum of $13,877.74.

Done in open court this 12 day of June, 1916.

JEREMIAH NETERER,

Judge. **[39]**

Exceptions of Receiver to Findings of Fact and Conclusions of Law.

To the foregoing findings A. R. Titlow, Receiver of the United States National Bank of Centralia, a creditor of this estate, appearing herein and objecting to the allowance of the preferred claim of H. W. MacPhail in the name and stead of the trustee in bankruptcy, duly excepted as follows in the name and stead of the trustee:

I.

To the following part of paragraph 9 of the findings:

> "At the time the United States National Bank procured the note on which its claim is founded and which makes it a creditor, it knew that MacPhail was in possession of the mill and all of the property of bankrupt and that the waiver was signed by the creditors and had full notice and knowledge of all the facts relating thereto,"

and each and every part thereof, on the ground that the same is contrary to the law and the evidence.

II.

To the remainder of said finding No. 9 if said remainder of said finding be construed to mean that the facts therein stated are sufficient to constitute notice to the United States National Bank of the said agreement exhibit "A" or the Bank's assent thereto, on the ground that the part of the finding referred to, if so construed, is contrary to the law and the evidence. [40]

III.

To the following part of finding No. 11:

"That neither the trustee nor any creditor other than the receiver trustee has protested the claim of MacPhail as a preferred claim"

and each and every part thereof, on the ground that the same is contrary to the law and the evidence.

IV.

To findings Nos. 5 and 6 and each and every part of each of those findings on the ground that the same are contrary to law and the evidence.

V.

Said creditor is the name of the trustee in bankruptcy further excepted to the conclusions of law as follows: to each and every one of the conclusions of law 1 to 3 inclusive and each and every part thereof, on the ground that the same are contrary to law and the evidence and the facts found. And for the further reasons that exhibits "A," "B-1," "B-2," "B-3" and "B-4" attached to MacPhail's proof of claim, and under which he claims priority, do not give any general lien against the assets of the bankrupt, but only as against the bankrupt a right to reimburse himself out of profits, if he made any, and out of the sale of the assets by him, and as against the creditors who signed the said exhibits "B," Macphail under said instruments had the right only to reimburse himself out of the profits from the operation of the plant, if he made any, and such creditors agreed only to extend the time of payment of their claims and to desist from pressing them as long as

MacPhail could make a profit of $1,000 or more per month, and not all the creditors assented even to that extent; and for the further reason that the rights asserted in this proceeding by the [41] objecting creditor are those of the trustee in bankruptcy, and therefore no estoppel against any particular creditor is material, if any existed, and further that the evidence and the facts found are, as a matter of law, insufficient to prove that the United States National Bank or its receiver knew of or assented to the arrangement for giving MacPhail's priority even if the arrangement had that effect; for the further reason that the instrument purporting to give MacPhail priority being an instrument creating a lien, is invalid as against the trustee in bankruptcy, and the creditors of this estate, because it was not filed, recorded, executed or acknowledged, as required by the statutes of the State of Washington; for the further reason that under the evidence and the facts found by the Court MacPhail is not as a matter of law entitled to the allowance of any preferred claim whatever.

The foregoing exceptions presenting questions of law urged before this Court upon MacPhail's petition for review of the Referee's order disallowing his preferred claim, were duly called to the attention of the Court at and before the time of the signing of the foregoing findings, and are hereby allowed, this 12th day of June, 1916.

JEREMIAH NETERER,
Judge.

(Filed June 12, 1915.) [42]

Order Allowing Claim of H. W. MacPhail.

This cause duly came on for hearing on the 25th day of March, 1916, upon the petition of H. W. MacPhail to review an order of the referee in bankruptcy entered herein on the 6th day of October, 1915, disallowing the preferred claim sought to be established by the said H. W. MacPhail. The cause was argued by counsel, and now, upon consideration thereof, it is

ORDERED that the claim of said H. W. MacPhail be and it is hereby allowed as preferred in the sum of thirteen thousand eight hundred seventy-seven & 74/100ths dollars ($13,877.74).

To all of which A. R. Titlow, receiver of the United States National Bank, a creditor of this estate appearing herein and objecting to the allowance of such claim in the name and stead of the trustee in bankruptcy, with leave of Court first obtained upon the refusal of the trustee in bankruptcy so to do, duly excepted in the name and stead of the trustee, and such exceptions are allowed.

Done in open court this 12 day of June, 1916.

JEREMIAH NETERER,
Judge. **[43]**

And the said A. R. Titlow, in the capacity hereinbefore mentioned, further specifically excepted to the foregoing order upon the following grounds, to wit:

1. Upon the ground that under the instruments upon which MacPhail relies for priority, to wit, exhibits "A," "B-1," "B-2," "B-3," and "B-4," at-

tached to McPhail's proof of claim, he could claim priority of payment even as against the bankrupt only from profits or from moneys realized from the sale of the assets by him, and that the only assent given by the creditors was that some of them assented to MacPhail's reimbursing himself out of the profits of the operation of the plant, if he made any, and such creditors agreed only to extend the time of payment of their claims and desist from pressing them as long as MacPhail could make a profit of $1,000 or more per month, and that not all of the creditors assented even to that extent.

2. That the evidence and the facts found are insufficient as matter of law to charge the United States National Bank with notice or to imply assent on its part to the arrangement for giving MacPhail priority, and for the further reason that the objecting creditor is here asserting the rights of the trustee in bankruptcy, and therefore no estoppel against any particular creditor, even if such existed, is material.

3. For the further reason that the conveyance or assignment to MacPhail, being an instrument creating a lien and not being filed, recorded, executed or acknowledged as required by the statutes of the State of Washington, is invalid as against the trustee in bankruptcy and the creditors of this estate.

4. For the further reason that under the evidence and the facts found by the Court, MacPhail is as a matter of law not entitled to a preferred claim in the sum of $13,877.74 or any other sum.

The foregoing exceptions presenting questions of law which were urged before this Court upon the

hearing of MacPhail's petition to review [44] the order of the Referee in Bankruptcy disallowing his preferred claim are hereby allowed this 12th day of June, 1916.

JEREMIAH NETERER,
Judge.

(Filed June 12, 1916.) [45]

Demand and Notice of Receiver of U. S. National Bank of Centralia to Trustee in Bankruptcy.

To Robert G. Chambers, Trustee in Bankruptcy Herein:

Demand is hereby made upon you by A. R. Titlow, receiver of the United States National Bank of Centralia, Washington, a creditor of this estate in the sum of $16,255.75, whose claim has been proved and allowed herein, to take such steps as may be necessary and proper to obtain a review by the Circuit Court of Appeals for the Ninth Circuit, of the order of the above-named court, entered herein on the 12th day of June, 1916, allowing a preferred claim to H. W. MacPhail.

And you are hereby notified that in the event of your refusal or failure to institute such proceedings before the 21st day of June, 1916, we shall, on that date, at 10 o'clock A. M., apply to the above-named court, at Seattle, Washington, the Honorable Jeremiah Neterer presiding, for an order permitting the undersigned to take such proceedings in your name and stead.

Dated at Seattle, Washington, this 13th day of June, 1916.

A. R. TITLOW,
Receiver of the United States National Bank of Centralia,

By OLDHAM & GOODALE,
His Attorneys.

(Affidavit of service attached.)
(Filed June 22, 1916.) [46]

Order Shortening Period of Notice of Receiver to Trustee in Bankruptcy.

On application of A. R. Titlow, Receiver of the United States National Bank of Centralia, a creditor of this estate, and good cause being shown, it is

ORDERED, that five days' notice, by mail, to Robert W. Chambers, Trustee in Bankruptcy shall be sufficient notice of said creditor's intention to apply to this Court to take whatever proceedings are necessary to obtain a review by the Circuit Court of Appeals for the Ninth Circuit, of the order of this court allowing a preferred claim to H. W. MacPhail; such notice being deemed reasonable and adequate in the premises.

Done in open court this 12 day of June, 1916.

JEREMIAH NETERER,
Judge.

(Filed June 13, 1916.) [47]

Order Permitting Creditor to Take Appellate Proceedings in Name of Trustee.

It appearing that A. R. Titlow, Receiver of the United States National Bank of Centralia, Washington, a creditor of this estate, has made due written demand upon the Trustee in Bankruptcy to take such steps as may be necessary and proper to obtain a review by the Circuit Court of Appeals for the Ninth Circuit of the order of this Court entered herein on the 12th day of June, 1916, allowing a preferred claim to H. W. MacPhail; and it appearing that the Trustee has failed to institute such proceedings, and that said creditor has given due notice of his intention to apply at this time and place for an order permitting him to take such proceedings in the name and stead of the Trustee, the said creditor having prosecuted the petition for review before this Court; now, the Court being fully advised in the premises, it is

ORDERED that A. R. Titlow, Receiver of the United States National Bank of Centralia, Washington, a creditor of this estate and a party in interest herein be and he is hereby given leave to take such proceedings whether by appeal or by petition for review, or both, as he may be advised and as may be necessary and proper to obtain a review by the Circuit Court of Appeals for the Ninth Circuit of the order of this Court allowing such preferred claim.

Done in open court this 21st day of June, 1916.

JEREMIAH NETERER,

Judge.

(Filed June 22, 1916.) [48]

Petition for Appeal.

Comes now A. R. Titlow, as receiver of the United States National Bank of Centralia, Washington, a creditor of this estate, having been by order of this Court duly entered herein permitted to appeal in the name and stead of the trustee in bankruptcy, and feeling himself aggrieved by the order entered in the above-entitled court and cause on the 12th day of June, 1916, allowing a preferred claim against this estate to H. W. MacPhail, does hereby appeal in the name and stead of Robert G. Chambers, trustee in bankruptcy herein, from said order to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the assignment of errors which is filed herein, and prays that this appeal may be allowed and that a transcript of the record, proceedings and papers upon which said order was based, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, sitting at San Francisco, California.

R. P. OLDHAM,

R. C. GOODALE,

Solicitors for Appellant.

(Filed June 22, 1916.) [49]

Assignment of Errors.

Now, on this 21st day of June, 1916, comes A. R. Titlow, as receiver of the United States National Bank of Centralia, Washington, a creditor of the above-named estate and files the following assignment of errors in the name and stead of Robert G. Chambers, trustee in bankruptcy herein, and says that the order entered in the above-entitled cause on the 12th day of June, 1916, allowing a preferred claim to H. W. MacPhail is erroneous and unjust to him and to said trustee in bankruptcy and to all the creditors of this estate:

1. Because the District Court erred in finding and adjudging that the said H. W. MacPhail was entitled to a preferred claim against this estate in any sum whatever, for the reasons stated in this appellant's exceptions to order allowing claim, filed herein June 12, 1916.

2. Because the District Court erred in finding that said H. W. MacPhail was entitled to any claim whatsoever against this estate since the proof shows that MacPhail has received unlawful preferences which he has not surrendered.

WHEREFORE the aforesaid creditor in the name and stead of the trustee in bankruptcy prays that said order be reversed and the District Court be directed to disallow the claim as preferred or otherwise, and for such other relief as the trustee in bankruptcy or the aforesaid creditor acting herein in his

name and stead may be entitled to in equity.

R. P. OLDHAM,
R. C. GOODALE,
Solicitors for Appellant.

(Filed June 22, 1916.) [50]

Order Allowing Appeal.

A. R. Titlow, as Receiver of the United States National Bank of Centralia, Washington, a creditor of the above-named estate, having been duly permitted by order entered herein to appeal in the name and stead of the trustee in bankruptcy from the order of this court entered herein on the 12th day of June, 1916, allowing a preferred claim against this estate to H. W. MacPhail, and having heretofore filed his assignment of errors and petition for appeal from said order; and it appearing that he has been directed by the Comptroller of the Currency of the United States of America to take such appeal; Now, Therefore, it is hereby

ORDERED that the petition for appeal be granted and the appeal is hereby allowed, and that such appeal shall be taken in the name and stead of Robert G. Chambers, trustee in bankruptcy of this estate. It is further

ORDERED that the appellant shall not be required to furnish any security upon said appeal.

Dated this 22 day of June, 1916.

JEREMIAH NETERER,
Judge.

(Filed June 22, 1916.) [51]

Certificate Directing Appeal or Petition for Review.

To A. R. Titlow, Receiver of the United States National Bank of Centralia, Washington:

You are hereby directed to take whatever proceedings may be necessary, whether by petition for review or by appeal, or both, as you may be advised, either in your own name or in the name and stead of the Trustee in Bankruptcy of the above-named estate, to procure a review by the Circuit Court of Appeals for the Ninth Circuit, of the order of the District Court for the Western District of Washington, Southern Division, entered in the above-entitled cause on the 12th day of June, 1916, allowing a preferred claim to H. W. MacPhail against the above-named estate.

WITNESS the Honorable T. P. KANE, Acting Comptroller of the Currency, this 19th day of June, 1916.

[Seal of Comptroller of the Currency.]

T. P. KANE,
Comptroller of the Currency.

(Filed July 6, 1916.) [52]

Petition for Review of Referee's Order.

R. F. LAFFOON, Esq., Referee in Bankruptcy.

Comes now H. W. MacPhail and petitions the Honorable R. F. Laffoon for an order certifying to the Honorable Edward E. Cushman, Judge of the above-named court for review all of the matters pertaining in and to the order entered herein on the 6th day of October, 1915, a copy of which is hereto

annexed, relating to and finding against the claim of the said H. W. MacPhail and denying his claim both as a preferred claim and a common claim against said estate and the trustee in bankruptcy thereof.

Your petitioner feels aggrieved because of such order and says that the said order and decree is erroneous and against the just rights of your petitioner and contrary to the laws and facts, for the following reasons:

I.

That from the evidence introduced at said hearing, your petitioner is entitled to a preferred claim against said insolvent estate and the trustee in bankruptcy therefor, and is and was entitled to priority in payment of his claim and the referee errored in not entering an order herein adjudging petition to be entitled to priority of payment, and ordering and directing the trustee of the above-named bankrupt, to pay said claim as a prior and preferred claim.

II.

That the evidence shows that the claim of your petitioner was a provable debt against the estate of said bankrupt and the referee erred in not allowing said claim against said estate.

III.

That the evidence shows that the judgment, decree and [53] order should have been in favor of this petitioner and against the trustee of the above-named bankrupt, in that said indebtedness was contracted by your petitioner on and between the 29th day of October, 1912, and the 30th day of July, 1913,

while he was acting as assignee for the benefit of creditors of said Creech Bros. Lumber Company, now bankrupt, under a general assignment for the benefit of creditors which is attached to his proof of claim herein, and while acting as such assignee he expended money to the amount of $13,877.74 in excess of the amount which he received.

And at the time of filing of said petition in bankruptcy, there was due your petitioner as interest on the said amount so advanced by him as assignee, the sum of $1,292.89 no part of which has been paid, and under the evidence introduced at this hearing and under and pursuant to the laws of the State of Washington and the acts of Congress relating to bankruptcy, your petitioner was and is entitled to priority of payment and said referee errored in not finding and entering an order adjudging and decreeing your petitioner entitled to priority of payment.

Your petitioner further represents that his claim was filed with the trustee of the above-named bankrupt and the referee within the time provided by law, which claim was in the form and sworn to as required by law, and was filed with the trustee on or about the 24th day of April, 1915, and is now on file in the office of the referee.

WHEREFORE, the said H. W. MacPhail prays that the said order entered herein by the referee on the 6th day of October, 1915, be reviewed by the Honorable Edward H. Cushman, Judge of the above-named court and that said order be adjudged erroneous and void and that his claim be allowed as a

preferred claim, and that he be adjudged entitled to priority of payment from the funds and estate of said bankrupt, and that he have such other and further relief as [54] may be meet and equitable.

Dated at Raymond, Washington, this 19th day of October, 1915.

H. W. MACPHAIL,
Petitioner.
WELSH & WELSH,
Attorneys for Petitioner.

(Verification.)

* * * * * * * * *

Order Disallowing Priority to Claim of H. W. MacPhail.

This cause duly came on for hearing on the 14th day of July, 1915, upon the objections of A. R. Titlow, as receiver of the United States National Bank of Centralia, Washington, one of the creditors of this estate, to the claim of H. W. MacPhail (such objections being filed on behalf and in the name of the trustee of this estate upon leave of Court theretofore obtained after the refusal of the trustee in bankruptcy upon demand to make or file such objections) and was argued by counsel, thereupon, upon consideration thereof, it was

ORDERED as follows:

1. That the claim of H. W. MacPhail for priority of payment in the sum of $15,170.69, or any other sum, be disallowed.

2. That this order is made without prejudice either for or against H. W. MacPhail's right to file and prove a general claim against this estate, or the

trustee's right to recover any preferential payments from the bankrupt to H. W. MacPhail.

Done in open court this 6th day of October, 1915.

R. F. LAFFOON,
Referee in Bankruptcy. [55]

Certificate of Clerk U. S. District Court to Transcript of Record.

United States of America,
Western District of Washington,—ss.

I, Frank L. Crosby, Clerk of the United States District Court for the Western District of Washington, do hereby certify and return the foregoing and attached to be a full, true, and complete transcript of the record on appeal in the case of Creech Brothers Lumber Company, a Corporation, Bankrupt, A. R. Titlow, Receiver of the U. S. National Bank of Centralia, Washington, in the name and stead of Robert G. Chambers, Trustee, vs. H. W. MacPhail, lately pending in this court, as the same remains on file and of record in this office in said District, at Tacoma, and that the same is made pursuant to praecipe of counsel filed herein.

I further certify and return that I hereto attached and herewith transmit the original Citation and original Order extending time for transcript herein.

I further certify that the following is a full, true and correct statement of all expenses, costs, fees and charges incurred and paid in my office, by and on behalf of the petitioner A. R. Titlow, for making the record, certificate and return to the United States

Circuit Court of Appeals for the Ninth Circuit:

Clerk's fees (Sec. 828 R. S. U. S.) for making record, certificate and return 109 folios at 15¢..... 16.35

Certificate of clerk to transcript, 2 fo. @ 15¢..... .30

Seal to said certificate..... .20

ATTEST MY HAND AND OFFICIAL SIGNATURE and the seal of said Court, at Tacoma, in said District, this 21st day of July, A. D. 1916.

[Seal] FRANK L. CROSBY,
Clerk.
By E. C. Ellington,
Deputy Clerk. [56]

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 1627.

In the Matter of CREECH BROTHERS LUMBER COMPANY, a Corporation, Bankrupt.

Citation on Appeal.

The United States of America,—ss.

To H. W. MacPhail, Greeting:

You are hereby notified that in a certain proceeding in bankruptcy in the United States District Court for the Western District of Washington, Southern Division, entitled In the Matter of Creech Brothers Lumber Company, a Corporation, Bankrupt, being bankruptcy cause No. 1627, an appeal in the name and stead of Robert G. Chambers, Trustee in Bankruptcy, has been allowed A. R. Titlow

as receiver of the United States National Bank of Centralia, Washington, a creditor of this estate, to whom permission to take such appeal in the manner and form aforesaid has been granted by order duly entered therein, from the order of the said District Court entered in said cause on the 12th day of June, 1916, allowing a preferred claim to you; and you are therefore hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit at the city of San Francisco, in the State of California, within thirty days from the date of this citation, to show cause if any there be why the said order appealed from should not be corrected and speedy justice done the parties in that behalf.

WITNESS the Honorable JEREMIAH NETERER, Judge of said United States District Court, this 22d day of June, 1916.

[Seal] JEREMIAH NETERER.

Due service of the foregoing citation is hereby admitted by H. W. MacPhail, claimant, by his solicitors of record this 30th day of June, 1916.

WELSH & WELSH and
M. M. RICHARDSON,
Solicitors for Claimant H. W. MacPhail. [57]

[Endorsed]: In the United States Circuit Court of Appeals for the Ninth Circuit. In the Matter of Creech Brothers Lumber Company, a Corporation, Bankrupt. Citation. Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Jun. 22, 1916. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy.

Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Jul. 6, 1916. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. ——

In the Matter of CREECH BROTHERS LUMBER COMPANY, a Corporation, Bankrupt.

Notice of Application for Extension of Time to File Record, etc.

To H. W. MacPhail, Claimant, and Messrs. Welsh & Welsh and M. M. Richardson, His Attorneys:

Please take notice that on the 17th day of July, 1916, at 10 o'clock A. M., or as soon thereafter as counsel can be heard, we shall present to the Honorable JEREMIAH NETERER, Judge of the United States District Court for the Western District of Washington, at the court room of said District Court at Seattle, Washington, an order, a copy whereof is herewith served upon you.

OLDHAM & GOODALE,
Attorneys for Appellant and Petitioner.

Service of the foregoing notice and of the order therein referred to is hereby admitted this 13th day of July, 1916.

WELSH & WELSH,
Attorneys for H. W. MacPhail. [58]

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. ——

In the Matter of CREECH BROTHERS LUMBER COMPANY, a Corporation, Bankrupt.

Order Extending Time to File Record upon Petition for Review and Appeal.

Upon motion of the appellant and petitioner, A. R. Titlow, Receiver of the United States National Bank of Centralia, appealing and petitioning for review in the name and stead of Robert G. Chambers, Trustee in Bankruptcy, and good cause being shown, it is

ORDERED That the appellant's and petitioner's time for filing the record of this cause both upon the appeal and the petition for review, and for docketing the case with the Clerk of the Circuit Court of Appeals at San Francisco, be and it is hereby extended to and including the 1st day of August, 1916.

Done in open court this 18 day of July, 1916.

JEREMIAH NETERER,
Judge. [59]

[Endorsed]: Original. No. ——. In the United States Circuit Court of Appeals for the Ninth Circuit. In the Matter of Creech Brothers Lumber Company, a Corporation, Bankrupt. Order Extending Time to File Record Upon Petition for Review and Appeal and Notice Thereof. Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Jul. 19, 1916. Frank L. Crosby, Clerk. By E. C. Ellington, Deputy.

[Endorsed]: No. 2827. United States Circuit Court of Appeals for the Ninth Circuit. In the Matter of Creech Brothers Lumber Company, a Corporation, Bankrupt. A. R. Titlow, as Receiver of the United States National Bank of Centralia, Appearing in the Name and Stead of Robert G. Chambers, as Trustee in Bankruptcy of the Estate of Creech Brothers Lumber Company, a Corporation, Bankrupt, Appellant, vs. H. W. MacPhail, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Western District of Washington, Southern Division.

Filed July 24, 1916.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

No. 2827

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

In the Matter of CREECH BROTHERS LUMBER COMPANY, a corporation,

Bankrupt.

UPON APPEAL AND REVIEW FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

BRIEF OF APPELLANT AND PETITIONER FOR REVIEW

OLDHAM & GOODALE,
WALTER L. NOSSAMAN,
Of Counsel,
Attorneys for Appellant and Petitioner.
1408 Hoge Building,
Seattle, Washington.

Filed
AUG 31 1916
F. D. Monckton,
Clerk.

SHERMAN PRINTING & BINDING CO., SEATTLE, WASH.

INDEX

STATEMENT

The "Assignment" to MacPhail 2

Assent by Creditors 3

MacPhail's Operations and Advances 4

Not All Creditors Assented 6

Proceedings in the Courts Below 8

Statement of Questions of Law Involved 9

ARGUMENT

The Conveyance to MacPhail 11

(a) Its Illegality 11

1. Opposed to Trust Fund Theory 13

2. A Fraudulent Conveyance 15

As a mortgage 15

As an assignment 19

(b) Its Construction 24

Extent to Which Creditors Assented 25

Rights of Trustee in Bankruptcy 28

Washington Statutes 28

Washington Decisions 30

Cases in this Court 31

Summary 32

Claimant's Lack of Equity 32

No. 2827

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

In the Matter of CREECH BROTHERS LUMBER COMPANY, a corporation,

Bankrupt.

UPON APPEAL AND REVIEW FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

BRIEF OF APPELLANT AND PETITIONER FOR REVIEW

STATEMENT.

This is an appeal from, and petition to revise in matter of law, an order of the United States District Court for the Western District of Washington, Southern Division, allowing to H. W. MacPhail a preferred claim against the bankrupt estate of

Creech Brothers Lumber Company, a corporation. The facts are as follows:

THE "ASSIGNMENT" TO MACPHAIL.

On and before October 29, 1912, Creech Brothers Lumber Company was operating a mill and engaged in the manufacture of lumber at Raymond, Pacific County, Washington (57). The company had become insolvent (57). On that date it executed to H. W. MacPhail the conveyance or assignment under which he now claims priority. This is attached as Exhibit A to MacPhail's proof of claim (22). The substance of it is set forth at page 11, *post*.

The construction and validity of this instrument are the principal questions involved in this appeal. They will be fully discussed later. For the present it is enough to say that it purported to assign and transfer all of the property, real and personal, of the Lumber Company to MacPhail, giving him full power to sell and dispose of it and to use the money for the purpose of paying the indebtedness of the corporation or for operating expenses or any other purpose for which he might see fit to use it. It was contemplated that MacPhail should make certain loans to the company. As to

these he was given a right of reimbursement from two sources:

(a) *from profits.*

(b) from the sale of the assets *by him.*

His operations showed no profits, but a loss (46); and he did not sell the assets (46, 47).

This instrument was signed by the officers of the Lumber Company but was not acknowledged. It was not recorded (46, 60).

Assent by Creditors.

At or about the same time certain creditors of the Lumber Company signed an agreement containing certain waivers. Four copies of this agreement were signed by different sets of creditors. These are designated as Exhibits B-1, B-2, B-3, and B-4, in claimant's proof of claim, but inasmuch as all four are identical and are so described in the proof of claim, we have brought to this court only B-1 in full (27), and the lists of creditors whose names were affixed to B-2, B-3, and B-4 (31, 32). The construction of these creditors' agreements is one of the principal questions involved in this appeal. They provided in substance that in consideration of the assignment to MacPhail and

his agreement to finance the plant ,the creditors who signed these instruments would agree to two things: (1) *to extend the time of payment* of their claims; and (2) *to desist from pressing them* in the courts or otherwise *as long as the plant was operated at a monthly net profit of $1,000 or more.*

They did not assent to MacPhail's having any lien whatever.

MacPhail's Operations and Advances.

MacPhail took charge of the plant under the instrument above referred to and operated it at intervals until August, 1913 (37, 59). According to MacPhail's manager, the plant showed a profit of $1,000 or more per month from February to June 1, 1913 (37, 59). MacPhail entered into a contract for quite a large shipment of lumber, but on account of a break in prices of other lumber not called for in this particular order, but which had to be manufactured at the same time in order to make a profit, a heavy loss was experienced (39, 59). *The net result of MacPhail's operations was that the estate lost money* (40, 46). This so far as the record shows was not due to any negligence or mismanagement on his part, and apparently the plant was conducted in the ordinary and usual manner (36).

MacPhail continued in charge of the property of the bankrupt until the appointment of a receiver for the company in a suit in the Superior Court of the State of Washington for Pacific County. This occurred on July 28, 1914 (7). On August 27, 1914, a petition in involuntary bankruptcy was filed against the Lumber Company and adjudication followed on November 16, 1914 (46, 2). On December 28, 1914, Robert G. Chambers was appointed trustee in bankruptcy for the Lumber Company and is still its trustee (47).

The property of the company was not sold by MacPhail, but was sold in the bankruptcy proceedings, the amount realized being less than enough to pay MacPhail's preferred claim. Some $137,000 in claims have been proved against the estate (47).

At various times during the course of MacPhail's operations he advanced sums of money to the Lumber Company and made certain payments from the Lumber Company to himself upon account. These payments are tabulated in Exhibits C and D attached to MacPhail's proof of claim (33-35). The sums set forth in Exhibit C (35) in the column headed "Assignee" under "Receipts" and "Expenditures" respectively show payments from and to MacPhail (40). It will be noted that in July,

1914, as shown by Exhibit C, MacPhail received a payment from the company of $1,171.93, and in April of $319.97. The bankruptcy petition was filed in August. Therefore unless MacPhail's claim is preferred, he can prove no claim at all without the surrender of these payments, of which the July payment at least is clearly preferential. MacPhail admits that certain indebtedness was contracted in the name of the corporation which was not paid by him, *which is still a claim against the company* (45).

He advanced, he states, in excess of sums received from the company, the sum of $13,877.74, upon which he claims interest in the sum of $1,292.98, as itemized in Exhibit D attached to his proof of claim, making a total sum of $15,170.69, for which he claims priority.

Not All Creditors Assented.

Some contention was made in the courts below that all of the creditors of the Creech Brothers Lumber Company signed the Exhibits B above referred to. This, as we shall later show, is immaterial if true. But it is not true. The schedules of the bankrupt filed in the bankruptcy court on December 9, 1914, (52-57) showed some nineteen creditors whose names do not appear in the lists of as-

senting creditors attached to Exhibits B. For the convenience of the court we here enumerate those creditors: W. S. Applegate, P. W. Rhodes, W. R. Johnson, Calhoun, Denny & Ewing, Bell Bros. Hardware Co. (this copartnership was one of the petitioning creditors who instituted these bankruptcy proceedings), Standard Towboat Co., James Churchill Glove Co., Portland Machinery Co., Allis-Chalmers Mfg. Co., Great Western Smelting Co., Mill & Mine Supply Co., E. C. Atkins & Co., South Bend Mills & Timber Co., Mrs. Bertha C. Stringer, Benson Office Supply Co., Raymond Livery & Garage, Transit Towboat Co., B. F. Armstrong, and H. H. Powelson.

It appears from the evidence that it would have been impossible to obtain a complete list of the creditors of the company at the time these agreements were executed, because as MacPhail's own manager testifies (42), the affairs of the corporation were in such shape at the time they took charge *that it was impossible to tell to whom or in what amounts the company was indebted.* This matter we do not deem important, but as it is a fiction which was pressed with some earnestness in the court below, we think it is necessary to have the actual facts before this court.

Proceedings in the Courts Below.

The trustee in bankrutpcy refused, upon demand, to file objections to MacPhail's preferred claim. A. R. Titlow, receiver of the United States National Bank, a creditor of the estate in the sum of $16,255.75 (48), thereupon obtained leave of the bankruptcy court to make such objections in the trustee's name. These facts are recited both in the orders of the Referee and of the District Court hereinafter referred to. A hearing was had before the Referee upon the objections, and on October 6, 1915, an order was entered disallowing the claim both as a general and as a preferred claim, but without prejudice to the right to prove a general claim, or the trustee's right to recover preferences (50). MacPhail then petitioned for review by the District Court, and on the 12th day of June, 1916, that court entered an order reversing the Referee and allowing priority to the claim in the principal amount claimed, namely, $13,877.74 (65). The claim for interest was rejected.

Receiver Titlow again made written demand upon the trustee in bankruptcy to take such proceedings as might be necessary to obtain a review by this court of the District Court's order (67). Upon the trustee's failure to take such proceedings,

the objecting creditor, on next to the last day upon which an appeal could be taken, after notice to the trustee, applied to the District Court and obtained permission to take such proceedings in the name and stead of the trustee (69), but did not actually appeal until the very last day of the period for appeal under the ten-day statute. Being somewhat in doubt as to the correct procedure for obtaining a review of the District Court's order, he has brought the case to this court both by petition for review and by appeal. This practice has been approved by this court. *Chavelle vs. Washington Trust Co.,* 226 Fed. 400.

Questions of Law Involved.

It will contribute somewhat to clearness in the presentation of the questions involved to state the respective contentions of the parties *pro* and *con* with respect to the claim. Counsel for claimant argues that the conveyance to MacPhail was an assignment for the benefit of creditors, and that the claimant on that account is entitled to priority for the loans which he made to the bankrupt. *The principal contention,* however, is that MacPhail, under the so-called assignment to him from the bankrupt, was given a right to a *general lien* against its assets, and that all the creditors *assented* to his having such lien.

This is not true as we have previously pointed out (*supra,* p. 6).

On the other hand, it is our contention: (1) that this was a fraudulent conveyance, and not an assignment for the benefit of creditors; and if it were such an assignment, no right of priority would thereby be conferred for advances such as these; (2) that under the assignment to MacPhail no general right of lien was given; (3) that none of the creditors assented to his having a lien of any sort on the assets of the company; (4) that the instrument, not being recorded, executed, or acknowledged in accordance with the statutes of Washington, *cannot confer a lien as against the trustee in bankruptcy or the creditors.*

Specification of Errors.

1. The District Court erred in finding and adjudging that MacPhail was entitled to a preferred claim in any sum whatever, for the reasons hereinbefore stated.

2. The District Court erred in finding and adjudging that MacPhail was entitled to any claim whatever, since the proof showed that he had received unlawful preferences which had not been surrendered.

ARGUMENT.

MacPhail's claim can be sustained only by making various assumptions both of law and fact which we believe to be erroneous. The first of these is as to the *validity and effect of the instrument* under which his rights are asserted. If the effect of this instrument is not such as he conceives it to be, or if it be invalid, claimant's rights are concluded at the very threshold of the case; while, as we shall show later, even if the instrument has the effect which he supposes, this does not by any means determine the case in his favor; there are other elements in the case sufficient to defeat him.

The Conveyance to MacPhail.

(*a*) *Its Illegality.*

We have already briefly referred to this instrument (p. 2, *supra*). We will now analyze it more fully. (See pp. 22-26.) After reciting the insolvency of the Lumber Company, and that MacPhail is willing to finance its operation if he be protected for advances, and if the creditors will extend the time of payment of their claims, MacPhail is appointed the *agent* of the Lumber Company to take charge of all its property, and the company sells, transfers and assigns to MacPhail all its prop-

erty, real and personal, with authority to dispose of it and to use the proceeds for the "purpose of paying the indebtedness of said corporation or the operating expense, *or any other purpose for which he may deem best,* or for the purpose of enlarging, adding to or repairing said mill plant; also the right and authority *to borrow money or otherwise contract indebtedness in the name of said corporation,"* and to purchase logs, employ labor, etc., *for cash or on credit.* The instrument further states that it is understood that any sums advanced by MacPhail, or any indebtedness he may contract in operation or in the purchase of logs, etc., shall be a first and prior *lien* to be paid before any sums due the creditors. The court will note here *the absence of any statement as to what the lien shall be on.* We will refer to this later (p. 24).

It is further provided that MacPhail will, as the company's agent, operate the mill in the name of the corporation as long as it can be operated at a net profit of $1,000 or more per month, and that *from the profits* derived from the operation of the plant, he shall first reimburse himself for any sums advanced by him, and shall next pay any indebtedness which he may have contracted, the remainder to go to creditors. The next paragraph

gives MacPhail the *option* to cease operating the plant in case it shall not clear $1,000 per month, and to sell the property for the purpose of *first reimbursing himself* for any sums advanced by him, or any sums contracted by him in the operation of the plant, and second to pay the creditors.

Under this instrument MacPhail asserts a general lien against the bankrupt's assets. We propose to show that if the instrument does confer this broad right of lien, *it is absolutely null and void.* This for two reasons: *first,* it is violative of the trust fund theory as to the assets of insolvent corporations recognized by the law of the State of Washington; *second,* it is a fraudulent conveyance, hindering and delaying creditors.

1. *As to the trust fund theory.* The doctrine that the assets of an insolvent corporation are a trust fund for the equal benefit of all its creditors is too well established in the State of Washington to require extended discussion or citation. It was first enunciated in the early case of *Thompson vs. Huron Lumber Co.,* 4 Wash. 600, and has become the settled law of this state.

It is true that the doctrine is most commonly applied to preferential transfers or mortgages to

secure antecedent debts. But it has a broader application. The aspect of it which we wish to emphasize here is that it is not the policy of the law of this state to permit the indefinite prolongation of dying corporations, or the indefinite continuance of the corporate business when hope of success of the venture has been really abandoned.

Thus, in the *Huron Lumber Co.* case, 4 Wash. 600, 603, the court says, referring to a provision in a corporate mortgage whereby the corporation was permitted to prosecute its ordinary business for an indefinite time:

"This will not do in the case of an insolvent corporation, no matter what the good faith of its creditor is. *When it has reached a point where its debts are equal to or greater than its property, and it cannot pay in the ordinary course, and its business is no longer profitable, it ought to be wound up and its assets distributed.* Therefore no device can receive the countenance of the courts which provides for an indefinite continuance of its corporate life under the protection of a mortgage, against the protest of those who are entitled to share in its property, be it much or little. *The hindrance and delay contemplated by the terms of the instrument ought to render it null and void.*"

Can the provisions of the so-called assignment to MacPhail be reconciled with this salutary rule of public policy? Here is an instrument which does not require the winding up of the insolvent corpora-

tion's business, *but permits its indefinite prolongation.* It does not require the payment of debts, *but permits the imposition of new ones* upon the already overburdened assets. Further, these new obligations, at least so far as they are owing to MacPhail or represent debts for which he has become chargeable, *are to rank ahead of outstanding obligations. MacPhail is not even required to use any money which may come into his hands for the purpose of paying debts at all.* He is allowed to use it "for any other purpose for which he may deem best." No limitation whatsoever is placed upon his duties or obligations. This trust fund of creditors is turned over to MacPhail for the purpose of speculation and squandering *ad libitum.* It is an attempt to confer upon MacPhail powers which no one would contend *that the corporation itself had,* for clearly it could not so alienate this trust estate from its lawful beneficiaries. An arrangement more obviously void and inimical to public policy can scarcely be conceived.

2. *As to its being a fraudulent conveyance.* For reasons other than those having their origin in any doctrine peculiar to the law governing corporations, *it is a fraudulent conveyance,* irrespective of the intention of the parties to it.

Let us again notice its provisions. In the *first* place it purports to divest the corporation of *title.* Where are creditors to look for payment? They cannot resort to the ordinary legal processes for collecting their claims, for the corporation no longer has assets. They must look for payment to this benevolent gentleman *whose lien is prior to theirs; second,* this instrument not only imposes no limitation upon MacPhail's authority in disposing of the company's property, but, as above noted, expressly authorizes him to use its assets "for any other purpose for which he may deem best." Under this provision he can divert the funds coming into his hands to any purpose, or launch out into new ventures until all the property turned over to him has been dissipated; *third,* it empowers him to create new indebtedness which shall be a lien prior to existing claims.

The obvious result of all these provisions is to hinder and delay creditors. This, under all of the authorities, constitutes a fraudulent conveyance.

In *Dearing vs. McKinnon Hardware Co.,* 58 N. E. 773, the New York Court of Appeals had before it a purported mortgage given by an insolvent to a trustee, which provided that it should operate only in favor of those assenting to its terms, and

required an extension of payment for ninety days on the part of creditors, and placed the property of the mortgagor beyond the reach of creditors. The court says (p. 776):

"An insolvent corporation, under the protection of this ingenious instrument, is permitted to keep possession of all its property, to continue its business, to buy, manufacture, and sell 'in the usual course of trade,' which admits of sales on credit, and the creditors, whether preferred or unpreferred, unless they are willing to let this condition of affairs continue for 90 days, and tie their own hands by an extension of time for the payment of their debts, must lose all benefit from the mortgage, and every chance of having their debts paid out of the assets of the mortgagor until a surplus, after paying all assenting creditors, should come back into its possession. There was not even a promise by the mortgagor to pay the proceeds of sales to the trustee, although the latter was 'authorized and empowered to receive' them. Thus the mortgagor could keep its creditors at bay for 90 days, and continue in the possession and use of its property during that period. The inevitable result would be to hinder and delay creditors in violation of law."

The case at bar is much stronger. Here the property of the corporation was to be kept away from creditors not for 90 days, as in the New York case, *but forever.* The instrument involved in the case at bar also, it will be observed, gives the trustee much greater latitude in respect to disposing of the property and creating new and prior liabilities than was given by the mortgage in the New York case.

A similar conveyance was before the Supreme Court of Michigan in *Pettybone vs. Byrne,* 56 N. W. 236, where a lumber company, heavily indebted, gave a conveyance of its property to a trustee, empowering him to take possession, carry on the business, borrow money, etc. The court says (p. 239):

"The instrument in question * * * operated as a fraud on the creditors who had not accepted the benefits of the trust. It is not a mortgage, merely, for the reason that the property is conveyed absolutely to the trustee, *and is beyond the reach of the creditors.*"

Again, in *Jenkins vs. John Good Cordage Co.,* 68 N. Y. S. 239; 56 App. Div. 573, affirmed 61 N. E. 1130, an insolvent corporation gave a mortgage to a trustee to secure its indebtedness, creditors being required to exchange the corporation's notes which they held for bonds under this corporate mortgage. The instrument was held a fraudulent conveyance, since the only recourse left to non-assenting creditors would be a right to levy upon a worthless equity.

Again we find the instrument before the court surpassing all precedent in illegality. For here not even an *equity* was left to creditors, since the *title* was purported to be conveyed to MacPhail.

We believe further amplification of authorities unnecessary. The following are apposite:

Wood vs. Eldredge, 111 N. W. 168 (Mich.).
Volentine vs. Hurd, 21 Fed. 749 (C. C. Vt.).
DeWolf vs. Sprague Mfg. Co., 49 Conn. 282.
Gregg vs. Cleveland, 17 S. W. 777 (Texas).
McDonald vs. Hoover, 44 S. W. 334 (Mo.).
Hungerford vs. Greengard, 69 S. W. 602 (Mo.).
Thompson vs. Huron Lumber Co., 4 Wash. 600.

A further point is so closely related to the topic now under discussion that we will notice it briefly here. It was claimant's contention that the instrument in question is an assignment for the benefit of creditors. In showing that it is not such an assignment we possibly anticipate matter more properly reserved for reply. But in making this negative showing we shall at the same time advance our affirmative argument upon the point that this is a fraudulent conveyance.

NOT AN ASSIGNMENT FOR CREDITORS.

Judge Sanborn, in *Missouri American Electric Co. vs. Hamilton Shoe Co.,* 165 Fed. 283, 288, defines an assignment for the benefit of creditors as "a conveyance by a debtor, without consideration from the grantee, of substantially all of his property in trust, to collect the amounts owing to him, to sell and

convey the property, to distribute the proceeds of all the property among his creditors, and to return the surplus, if any, to the debtor."

In 5 Enc. L. & Pr. 1005, it is defined as "a transfer without compulsion of law by a debtor of his property to an assignee or trustee, in trust, to apply the same or the proceeds thereof to the payment of his debts, and to return the surplus, if any, to the debtor."

The purpose of such an assignment, it will be seen, is to bring about the application of the debtor's property, with such speed as is consistent with the interests of creditors, to the payment of his debts. Any provisions, therefore, such as a provision for the *indefinite carrying on of the business* of the debtor, the *creation of new liabilities,* or the *imposition of new burdens upon the debtor's property,* tend to defeat the very ends which the assignment is intended to subserve, and render it null and void.

The deed of assignment in question contains all of these objectionable features. The most extraordinary powers are conferred upon this trustee. In addition to his authority to use the money obtained from the sale of the debtor's property for "any other purpose for which he may deem best," he is

empowered to use it "for the purpose of enlarging, adding to or repairing said mill plant; also the right and authority to borrow money or otherwise contract indebtedness in the name of said corporation," and to purchase logs, employ labor, etc., for cash or *on credit.* It is provided that if the plant does not clear the sum of $1,000 per month, that the trustee may *at his option* cease to operate the plant and sell the property. The instrument thus leaves it entirely optional with the trustee whether he will continue the operation of the plant *even though it were being operated at an actual loss.* Further, all that he advances *or becomes liable for* is to be *a prior lien.*

Provisions much less extreme than the foregoing are uniformly held to invalidate assignments irrespective of any actual fraudulent intent on the part either of the assignee or the assignor. A leading case is *Jones vs. Syer,* 52 Md. 211; 36 Am. Rep. 366. The assignment empowered the trustee "to carry on and conduct said business in his discretion for such time as in his judgment it shall be beneficial to do so, or to sell all of said goods and stock in trade and property at such times, in such manner and for such prices as he may deem proper, and to apply the proceeds," etc. The court says:

"It is obvious the certain effect of this clause would be to hinder and delay creditors, and as against them such provisions render the deed utterly void."

In *Dunham vs. Waterman,* 17 N. Y. 9, it was held that a provision in an assignment authorizing the assignees to complete the manufacture of certain unfinished machinery and materials in process of manufacture, at the expense of the assigned fund, as in their judgment might be advisable, so as to realize the greatest amount of money therefrom, renders an assignment fraudulent and void on its face, though an actual fraudulent intent was disproved.

In *Bodley vs. Robbins,* 7 Howard, 276; 12 L. Ed. 699, a deed of assignment by a banking and railroad corporation recited the embarrassed situation of the company and its inability to pay its debts, and purported to assign its property to trustees who were authorized to borrow $250,000 for the purpose of completing the company's railroad, to allow claims against the corporation, and out of the proceeds of the sale of its assets to first pay the principal and interest of the above loan, the balance to be distributed *pro rata* among creditors. The court says (p. 278):

"Upon its face this deed shows an intention by the bank *to postpone its creditors,* use the effects of

the bank for the completion of the railroad, pay the trustees enormous salaries, and make no dividend among the creditors of the bank until these objects are accomplished. This was proposed to be done with the consent of creditors, and if that consent had been given, there could be no objection to the arrangement. But the plaintiff * * * did not consent; consequently he was not bound by the deed of assignment. *It was fraudulent as against him and all other creditors of the bank who did not become parties to the deed.*"

Further authorities construing purported assignments similar to but less obviously illegal than that under discussion as fraudulent conveyances are the following:

Webb vs. Armistead, 26 Fed. 70 (C. C. Va.).
Cott vs. Knabe & Co., 26 S. E. 246 (Va.).
Gardner vs. Commercial Nat. Bank, 95 Ill. 298, 308.
Planck vs. Schermerhorn, 3 Barb. Ch. 644.
Inloes vs. American Exchange Bank, 11 Md. 173; 69 Am. Dec. 190.

We have thus shown that the so-called assignment to MacPhail is void (1) as *impairing the implied trust for creditors* under which the assets of an insolvent corporation are held; (2) *as a fraudulent conveyance,* whether it be regarded as a mortgage or as an assignment for creditors.

THE CONVEYANCE TO MACPHAIL (Continued).

(*b*) *Its Construction.*

We do not think, however, that the instrument in question purports to give MacPhail a general lien at all. The material portions of it have been set out, *supra,* p. 11. What is its real *meaning?*

It will be observed that MacPhail was given the right *as against the bankrupt* to reimburse himself out of two possible funds to be derived either (1) *from the profits* made by the plant under his management, or (2) from the moneys realized upon the *sale* of the assets *by him.* Neither event has occurred. He did not make any profits. On the contrary, he admits that the plant lost money under his management (40, 46); and he did not sell the property. We think, therefore, that irrespective of the illegality of the instrument, its defective form, and the failure to record it, *under MacPhail's agreement with the bankrupt,* even leaving also out of consideration for the moment the question of assent or non-assent of creditors, he is not entitled to claim a lien.

The claimant is then driven into this distressing situation. The validity of the instrument can be sustained only by adopting the narrow construction

giving him a prior right of reimbursement only *out of profits.* But this construction does him no good, for there were no profits. He must therefore contend for a *general lien;* but this construction renders the instrument null and void.

We are willing to leave it to MacPhail to elect which horn of the dilemma he desires to impale himself upon. The result will be equally fatal in either case.

For the purpose of the discussion as to the validity of the instrument, we have *assumed* what we will now prove to be *the fact,* (if it be material) that *no creditors assented* to the arrangement between the bankrupt and MacPhail. *Some* of the creditors did sign a certain paper. But the agreement therein contained was *entirely different* than MacPhail and the bankrupt had agreed upon. We have already referred to this briefly, *supra,* p. 3. We will now discuss it more fully.

EXTENT TO WHICH THE CREDITORS ASSENTED.

Now turning to the Exhibits B attached to claimant's petition, we find a very limited consent even on the part of the creditors who signed those papers. These instruments (see Exhibit B-1, p. 27) recite insolvency of the Lumber Company and

that its stockholders and trustees have agreed to make an assignment to MacPhail for the benefit of creditors and that "whereas the said H. W. MacPhail has agreed to operate said plant as assignee and purchase logs for that purpose, and otherwise finance the operation of the same, *provided the same can be operated at a profit,* and also *provided the creditors will extend the time of payment of their several accounts,* and desist from pressing said accounts until they can be paid by the profits derived from the operation of said plant."

It is then provided that the creditors signing the instrument agree:

"That they will *extend the time of payment of our* several claims and *desist from further pressing* said claims in the courts or otherwise, *so long as said plant is operated at a monthly net profit of $1,000 or more per month.* It being understood that *in the operation of said plant* that the said MacPhail shall first pay the cost of operation and all sums contracted by him as such assignee and all sums advanced by him, and further shall pay to the creditors," etc.

The court will observe that the only agreement on the part of the assenting creditors was (1) *to extend the time of payment* of their claims; (2) *to desist from further pressing* their claims. But this agreement to "extend time" and "desist from pressing" was by its terms *limited to such time as*

the plant could be operated at a monthly net profit of $1,000. The only consent by any creditor to any priority whatever to MacPhail is the provision that he was to have a prior right of reimbursement *out of the proceeds of the operation of the plant.* There is no provision which even suggests that MacPhail was entitled to or even intended to claim as against those creditors any priority to payment *out of the assets generally* of the Lumber Company. No creditor assented to MacPhail's having any such lien as that. The most that can be said is that *some of the creditors* were willing that he should pay himself back out of profits arising from the operation of the plant if he made any.

We take occasion here again to call attention to the fact that not all the creditors assented even to this extent. See p. 6, *supra.* Only a part of them consented to any arrangement whatever with MacPhail; and this consent was very limited in scope. This, in connection with the fact that the rights which claimant now asserts were not given him *even by his agreement with the bankrupt,* and that if such rights were given him *the whole agreement was thereby rendered void,* is sufficient for the determination of the case.

But we need not rest here. Let us assume for the sake of argument that the conveyance to MacPhail was valid, and that it did actually confer a right of lien. MacPhail has still another bridge to cross.

This brings us to the question of

What Are the Rights of the Trustee in Bankruptcy?

The most that can be said of the conveyance to MacPhail is that it purported *to create a lien* in his favor for subsequent advances. It must therefore be judged by the principles applicable to mortgages or other instruments creating liens. The relevant statutes of the State of Washington are as follows:

Rem. & Bal. Code, Section 3660:

"A mortgage of personal property is void as against creditors of the mortgagor or subsequent purchasers, and encumbrancers of the property for value and in good faith, unless it is accomplished by the affidavit of the mortgagor that it is made in good faith, and without any design to hinder, delay or defraud creditors, and it is acknowledged and recorded in the same manner as is required by law in conveyance of real property."

Section 3661:

"Every such instrument within ten days from the time of the execution thereof shall be filed in

the office of the county auditor of the county in which the mortgaged property is situated * * *."

Section 3668:

"A mortgage of personal property must be recorded in the office of the county auditor of the county in which the mortgaged property is situated, in a book kept exclusively for that purpose * * *."

Section 8781:

"All deeds, mortgages, and assignments of mortgages, shall be recorded in the office of the county auditor of the county where the land is situated, and shall be valid as against bona fide purchasers from the date of their filing for record in said office; and when so filed shall be notice to all the world."

Section 8745:

"All conveyances of real estate or of any interest therein and all contracts creating or evidencing any encumbrance upon real estate shall be by deed."

Section 8746:

"A deed shall be in writing, signed by the party bound thereby, and acknowledged by the party making it, before some person authorized by the laws of this state to take the acknowledgment of deeds."

Section 8782:

"Any mortgage upon property of a mixed character, consisting in part of real estate and in part of personal property, and particularly upon railroad property, in the State of Washington, shall be admitted to record and be recorded in the sev-

eral counties wherein the property is located as a real estate mortgage when acknowledged in the manner provided by law, and the original of such mortgage or a copy thereof certified by the auditor of any county in the State of Washington wherein the original has been recorded may be filed in a file to be kept for that purpose in the office of the auditor of the county wherein such property is situated, and said record and filing shall constitute notice to all persons of the existence of the mortgage lien provided for by said mortgage."

It will thus be seen that the law requires *recording, acknowledgment* and *affidavit of good faith* in order to protect such a lien as this against subsequent creditors, purchasers and incumbrancers.

Authority is hardly needed upon this point; but we make, in passing, brief reference to the following cases:

Mills vs. Smith, 177 Fed. 652 (C. C. A., 9th Cir.).
Smith vs. Allen, 78 Wash. 135 (effect of lack of acknowledgment and recording).
Pacific Coast Biscuit Company vs. Perry, 77 Wash. 353 (effect of failure to record).
Watson vs. First Nat'l Bank, 82 Wash. 65 (lack of recording).
Sligh vs. Sheldon, etc., R. R. Co., 20 Wash. 16 (necessity of affidavit of good faith).
Sayward vs. Thayer, 9 Wash. 22 (affidavit, acknowledgment and recording necessary).

That the trustee in bankruptcy under the 1910 amendment to Section 47-a of the Bankruptcy Act

occupies *the position of a creditor holding a lien* on the property of the bankrupt is too clear to admit of controversy.

We need only to refer to the following cases decided by this court:

Pacific State Bank vs. Coats, 205 Fed. 618, 622.
Meier & Frank Co. vs. Sabin, 214 Fed. 231.
Scandinavian-American Bank vs. Sabin, 227 Fed. 579.
Brandt vs. Mayhew, 218 Fed. 422.

See also:

Re Pacific Electric & Automobile Co., 224 Fed. 220 (D. C. Wash.).
Re Bolstad, 224 Fed. 283 (D. C. Wash.).
Re Bazemore, 189 Fed. 239 (D. C. Alabama).

The *Scandinavian-American Bank* case, 227 Fed. 579, above cited, is similar to the present one in that it involved *a mortgage attempted to be disguised as a trust agreement* which was held invalid as against the trustee.

SUMMARY.

For the sake of clearness we will state our contentions briefly in conclusion as follows:

1. Even *as against the bankrupt* MacPhail could claim priority of payment only *from profits* or moneys realized upon *the sale of the assets by him.* If a greater right of lien was conferred by the instrument it is null and void as (a) opposed to the trust fund theory; (b) a fraudulent conveyance.

2. *No creditor* agreed that he should have a lien *against the assets generally* of the bankrupt. Some creditors consented to his reimbursing himself *out of the profits,* if he could make them, and agreed to extend the time of payment of their claims and desist from pressing them as long as MacPhail could make a profit of $1,000.00 per month.

3. Only *a part* of the creditors assented to the arrangement even to that extent.

4. Even if MacPhail obtained a lien, it is invalid as against the trustee and the creditors.

The case presents no equities favorable to the claimant. He undertook to conduct the business of an insolvent lumber company, and involved both it

and himself in losses. He lost money, but so did many other creditors of the same debtor. From the remarks of the learned district judge in disposing of our petition for a rehearing we gathered the impression that he was influenced in some degree by the assumption that MacPhail acted somewhat in the role of a philanthropist, advancing his money for the benefit of others without hope or expectation of reward. This, if true, we do not believe to be important. But the assumption is a mistaken one. Both in his proof of claim and in the courts below, MacPhail has pressed a supposed claim for interest. Further, he was vice-president of the Willapa Harbor State Bank, which was during the period in controversy a creditor of the bankrupt to the extent of many thousands of dollars (29, 45, 52, 53). Doubtless he hoped to aid his bank. There is nothing wrong in this of course. But he stands on the same footing as anyone else who embarks upon a business venture.

The fact that he expected to be paid in full, upon which the District Court apparently placed some reliance, does not seem material. All the creditors of the bankrupt cherished the same hopeful illusion. The law favors equality of distribution of the losses resulting from a common ruin, in which

many innocent persons have become involved. The establishment of this claim will leave nothing for the payment of demands of other creditors. It is incumbent upon one asserting a right whose establishment will be attended by effects so injurious to others equally guiltless with himself to show clearly that he has complied with the conditions which the law has made precedent to the assertion of such a priority. *Schuyler vs. Littlefield,* 232 U. S. 707, 713; 58 L. Ed. 806, 809.

We believe that a more complete failure than this to show such a right or any right can scarcely be conceived. We respectfully submit that the order of the District Court allowing the claim should be reversed.

OLDHAM & GOODALE,
Attorneys *pro hac vice* for the Trustee in Bankruptcy.

WALTER L. NOSSAMAN,
Of Counsel.

No. 2827

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

In the Matter of Creech Brothers Lumber Company, a Corporation, Bankrupt.

A. R. Titlow as Receiver of the United States National Bank of Centralia, appearing in the name and Stead of Robert G. Chambers, as Trustee in Bankruptcy of the Estate of Creech Brothers Lumber Company, a Corporation, Bankrupt,
Petitioner and Appellant,

vs.

H. W. MacPhail,
Respondent and Appellee.

Filed
SEP 8 - 1916
F. D. Monckton,
Clerk.

UPON APPEAL AND REVIEW FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

BRIEF FOR RESPONDENT AND APPELLEE.

JOHN T. WELSH, MARTIN C. WELSH, Attorneys for Respondent and Appellee. Address 1-3 Welsh Building, South Bend, Washington.

No. 2827

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

In the Matter of Creech Brothers Lumber Company, a Corporation, Bankrupt.

A. R. Titlow as Receiver of the United States National Bank of Centralia, appearing in the name and Stead of Robert G. Chambers, as Trustee in Bankruptcy of the Estate of Creech Brothers Lumber Company, a Corporation, Bankrupt,
Petitioner and Appellant,

vs.

H. W. MacPhail,
Respondent and Appellee.

Upon Appeal and Review from the United States District Court for the Western District of Washington, Southern Division.

BRIEF FOR RESPONDENT AND APPELLEE.

STATEMENT OF THE CASE.

That on and prior to the 29th of October, 1912, Creech Brothers Lumber Company, which was a corporation duly organized and existing under and

by virtue of the Laws of the State of Washington, was engaged in operating a saw mill at Raymond, Washington. Creech Brothers Lumber Company had become insolvent and was unable to pay any part of its indebtedness and all of its creditors were pressing their claims. On October 29, 1912, the Creech Brothers Lumber Company entered into a contract in writing with H. W. MacPhail, a copy of which is found on pages 22 to 26 of the Transcript of Record. That at the time of the execution of said contract, each and all of the then creditors of the Creech Brothers Lumber Company entered into a written agreement authorizing the Creech Brothers Lumber Company to execute the contract with MacPhail. This written agreement is found on pages 27 to 29 of the Transcript of Record. All of the stockholders of the Creech Brothers Lumber Company also authorized it in writing to execute said contract with MacPhail. (See pages 26 and 27 of Transcript of Record). At the time of the execution of the contracts referred to, the United States National Bank of Centralia, Washington, was not a creditor of the Creech Brothers Lumber Company, and thereafter it was placed in the hands of a Receiver, and A. R. Titlow, the petitioner and appellant, is the Receiver of the United States National

Bank of Centralia. That at the time of the execution of the contract, which MacPhail had with the Creech Brothers Lumber Company, and at the time of the execution of the contracts by the then creditors of the Creech Brothers Lumber Company, the U. S. National Bank of Centralia was not a creditor of the said Lumber Company. But the Willapa Harbor State Bank was a creditor and it signed the agreement authorizing the Lumber Company to execute the contract with MacPhail, and thereafter the Willapa Harbor State Bank of Raymond, Washington, which held notes which had been executed by the Creech Brothers Lumber Company, sold said promissory notes to the United States National Bank of Centralia, and it was in this manner that the United States National Bank became a creditor of the Creech Brothers Lumber Company. These notes were sold to the United States National Bank subsequent to the execution of said contracts and while MacPhail was operating the Creech Brothers Lumber Company plant under said contracts. That at the time the United States National Bank purchased these notes from the Willapa Harbor State Bank, and thus became a creditor of Creech Brothers Lumber Company, it took with notice of all the facts and of the existence of the

contracts signed by the creditors and of the existence of the contract which the Creech Brothers Lumber Company had with MacPhail, for the reason that C. S. Gilchrist was the President of the Willapa Harbor State Bank and was the Vice President and Manager of the United States National Bank of Centralia, Washington, and the testimony shows that Gilchrist was instrumental in obtaining the signatures of some of the creditors to the contract which was executed between Creech Brothers Lumber Company and MacPhail, and he was instrumental in getting the creditors to sign and agree in writing that Creech Brothers Lumber Company might execute such a contract with McPhail. (See Transcript of Record, pages 43-44, and see also the Findings of Fact made by the Court on page 60). That after the execution of the contracts above referred to, Mr. MacPhail took charge of the plant and employed Mr. B. H. Lewis as manager. Mr. Lewis had had about thirteen years experience in the lumber business and had managed other lumber plants of greater capacity than the plant in question at that time and prior to that time he had been manager of the Quinault Lumber Company at Raymond, Washington, which mill had a cutting capacity of 100,000 feet per day. (See

Transcript of Record, pages 35 to 37). The plant was operated by Mr. MacPhail for a period of about seven and one-half months. During the early part of that period the plant was operated at a profit of $1000 or more per month, but later on, and somewhere about the first of June, 1913, there was a rapid decline in the lumber market, and within a period of thirty days thereafter the price of lumber declined from $8 to $10 per thousand. Before this decline occurred Mr. MacPhail had entered into contracts for the sale of certain lumber, but the contracts were such that the entire cut of the mill could not be applied on the contracts, that is, about thirty per cent. of the amount of lumber cut from each log could be made to apply on the particular contract, and consequently it was necessary for him to sell the remaining seventy per cent. in the open market, and when the decline occurred he found himself in this condition; he could continue cutting on the contract and while there was a profit in cutting this thirty per cent. that applied on the particular contract, there was considerable loss in handling the remaining seventy per cent. If he closed the mill and refused to fill the contracts, then of course he would be liable to an action for damages; and Mr. Lewis believed, and so testified,

that it was better to continue and complete the contracts, than be involved in litigation by reason of breaching the same. Mr. MacPhail, of course, followed the judgment and advice of Mr. Lewis, as he was a man skilled in the lumber business.

When Mr. MacPhail entered into the contract with the Creech Brothers Lumber Company there was a large sum of money due for delinquent taxes upon the property of the Lumber Company and a large sum due for fire insurance premiums written upon the plant and in order to maintain the insurance it was necessary to pay the premiums which were in arrears, and which Mr. MacPhail did pay, amounting to $3189.46, and he paid taxes amounting to $2165.01; and during the time he was operating the plant, he paid interest to the various creditors amounting to the sum of $8271.80, and paid a dividend of ten per cent. to each creditor, which dividend amounted to approximately $13,000. He also paid out a considerable amount of money for repair and maintenance of the plant which amount is carried on the itemized statement attached to his proof of claim under the head of "Supplies and Expense" and which amounted to the sum of $7028.02. (See pages 40-41, Transcript of Record).

We are calling the Court's attenton to these

matters for the reason that all of these sums were expended by MacPhail for the maintenance of the plant, and all inured to the benefit of the creditors, for the reason that the plant would have been left without insurance, would have been sold for taxes, and would have otherwise deteriorated had it not been for the fact that Mr. MacPhail loaned his credit and advanced his money for the protection of all the creditors under the contract with the corporation and with the creditors. Mr. MacPhail was acting entirely without compensation in an endeavor to save the Creech Brothers Lumber Company when it was financially embarrassed, and he entered into the contract with the Creech Brothers Lumber Company with the written consent of all of the creditors and all of the stockholders. See pages 27 to 32, Transcript of Record).

We desire to quote briefly from the two contracts, merely for the purpose of directing the Court's attention to what we consider the controlling clauses in the contracts. In Exhibit "A" (Pages 22 to 27, Transcript of Record) we find the following:

> "It being distinctly understood by and between the parties hereto that any sums ad-

vanced by the second party or any sums which he may contract as indebtedness in the operation of said plant, or in the purchase of logs or the employment of labor for the operation of said plant shall be a first and prior lien and shall be paid prior to the payment of any sums now due the creditors of said corporation.

"The second party agrees that he will, as agent for and in the name of said corporation, purchase logs and employ labor and operate said mill for and in the name of said corporation so long as the same can be operated at a net profit of One Thousand Dollars or more per month and that from the profits derived from the operation of said plant, he shall first reimburse himself for any sums advanced by him and shall next pay and discharge any bills or indebtedness which he may contract in the operation of said plant, and the remainder, if any, he shall pay to the creditors pro rata, share and share alike, in proportion to their said claims until all of said claims, together with interest thereon at the rate of eight per cent. per annum, have been fully paid, satisfied and discharged, and if there shall be any surplus, to pay the same to the first party, its successors and assigns.

"It being distinctly understood and agreed, however, that if said plant when operated in a good, diligent and business like manner should not clear the sum of One Thousand Dollars per month, net, that then the second party may at his option, cease to operate said plant, and sell and dispose of all of said real estate and personal property, and accounts and bills receivable for the purpose of first reimbursing himself

for any sums advanced by him or any sums contracted by him in the operation of said plant, and second to pay the creditors of the first party in full or pro rata, and the fact that he may cease to operate said plant shall not be construed as terminating his rights under this contract until he has been fully paid for all sums by him advanced and until all sums by him contracted for have been fully paid, satisfied and discharged, and creditors have been paid in full or said assets have been all reduced to cash and the second party reimbursed, and the balance paid pro rata to the creditors of the first party."

In exhibit "B" (Pages 27 to 29, Transcript of Record) which is the contract signed by the creditors, we find the following:

"It being understood that in the operation of said plant that the said H. W. MacPhail shall first pay the cost of operation and all sums contracted by him as such assignee, and all sums advanced by him, and thereafter shall pay to the creditors interest at the rate of eight per cent. per annum on their said accounts, and shall pay the balance to said creditors pro rata, share and share alike in proportion to their several claims, payments to be made quarterly, commencing on the 1st day of March, 1913, and continuing until all of said indebtedness, including principal and interest is paid in full."

In the operation of the plant as shown by the testimony, Mr. MacPhail expended $13,877.74 more than he received and on the date that the Creech

Bros. Lumber Co. became a bankrupt and was adjudged a bankrupt, to-wit, in December, 1914, interest had accrued thereon amounting to the sum of $1292.98, making a total of $15,170.69, for which sum Mr. MacPhail presented his claim to the Trustee in Bankruptcy of the Creech Brothers Lumber Company, and Mr. MacPhail in presenting said claim asked that the same be allowed as a preferred claim. This claim is very full and sets out the facts, is verified under oath and is found on pages 19 to 22 of the Transcript of Record. In this connection we may state that since the claim was verified under oath the allegations thereof must be taken as true unless the same have been refuted by testimony of the petitioner and appellant. The claim among other things contains the following allegations: "And each and all of the creditors entered into an agreement or agreements which are identical in form but for the purpose of convenience were executed in four separate instruments, which were signed by each and all of said creditors, and in said instruments said creditors and each and all of them agreed that any sums advanced or contracted by said H. W. MacPhail in the operation of said plant should be paid prior to the payment of any sums due said creditors." (See page 20, Transcript of Record). All

of the moneys for which Mr. MacPhail presented his claim and which he asked to be made a preferred claim, was paid out by him pursuant to the contracts mentioned with the creditors and stockholders and with the Lumber Company and was paid for the purchase of logs with which to operate the plant and for insurance and taxes on the property of the Creech Brothers Lumber Company. (See pages 36-42, Transcript of Record). Later, and on the 30th day of July, 1914, a Receiver was appointed in the State Courts for the Creech Brothers Lumber Company because it was insolvent, and thereafter and on the 28th day of December, 1914, the United States District Court adjudged the Creech Brothers Lumber Company to be an involuntary bankrupt. When a receiver was appointed by the State Court for said Lumber Company, of course the Receiver took possession of the property, and in that manner Mr. MacPhail was deprived of possession of the property and was unable to reimburse himself by the sale of the property or otherwise as the property was then and is now in the possession of the court.

The Referee in Bankruptcy disallowed priority to the claim of H. W. MacPhail. Thereafter, on an appeal being taken to the United States District

Court, the court allowed the claim in the sum of $13,877.74. For the Findings of Fact and Conclusions of law as made and filed by the Court for Review of the Order of the Referee in Bankruptcy and allowing MacPhail a preferred claim in such sum see Pages 57 to 61 of the Transcript of Record. For the order allowing the claim of Mr. MacPhail as a preferred claim in such sum as made and signed and filed by the Court, see Page 65, Transcript of Record. The order allowing the claim of MacPhail as a preferred claim in said sum is the order from which the petitioner and appellant has appealed. None of the creditors of the Creech Brothers Lumber Company have objected to the allowance of the claim of Mr. MacPhail except A. R. Titlow, as Receiver of the U. S. National Bank of Centralia, and he is the one who is contesting the claim of the respondent and appellee.

Mr. MacPhail took possession of this property about the 1st of November, 1912, and he retained possession thereof until the 30th day of July, 1914, a period of approximately twenty-one months. (Pages 36-47, Transcript of Record). The overhead expense of the plant of the Creech Brothers Lumber Company at the time Mr. MacPhail took possession thereof and while he was in charge was as follows:

Interest on indebtedness which was owing by the Creech Brothers Lumber Co. amounting to about $1000 per month; Taxes, $125 per month; Insurance, $190 per month; Watchman, about the sum of $75 per month; making a total fixed monthly charge of overhead expense against the plant in the sum of $1390 a month, or for twenty-one months the sum of $29,190. (Testimony of B. H. Lewis, Page 43, Transcript of Record).

Mr. MacPhail, while he operated the plant paid to the creditors of the Creech Brothers Lumber Company over $13,000, each creditor receiving ten per cent. on his claim, and in this connection, the U. S. National Bank of Centralia also received a dividend of ten per cent. from Mr. MacPhail while he was operating the plant on its claims, the same claims which are now represented by its receiver, the petitioner and appellant in the case at bar. (Transcript of Record, Pages 40-41-42.).

ARGUMENT, POINTS AND AUTHORITIES,

First.

On October 29th, 1912, when the Creech Brothers Lumber Company entered into the contract with Mr. MacPhail, which contract is found on page 22 of the Transcript, all of the then creditors of the Creech Brothers Lumber Company assented in writing to the execution of that contract and in particular the Willapa Harbor State Bank, consented and at that time the United States National Bank of Centralia was not a creditor but subsequently became a creditor by reason of having purchased certain promissory notes from the Willapa Harbor State Bank which had been executed by the Creech Brothers Lumber Company prior to the execution of this contract.

It will also be borne in mind that Mr. MacPhail operated this plant and was in possession of the same under this contract for a period of some twenty-one months before a receiver was appointed for the Creech Brothers Lumber Company and before Creech Brothers Lumber Company was adjudged a bankrupt.

Mr. MacPhail presented to the Referee and Trustee his claim which was verified, and which

claim is found on pages 19 to 22 of the Transcript of Record. In this claim there is a statement under oath that all of the creditors had assented and consented to the execution of this contract. (See Transcript of Record, page 19). This statement in this claim has never been denied and no testimony was ever introduced disputing or repudiating that statement. The only thing in the record or in the transcript that would tend to refute it is a schedule of creditors whose claims were unsecured, and same was filed by the bankrupt, Creech Brothers Lumber Company, on December 9, 1914, after it was adjudicated a bankrupt, and which was more than two years after the date of the execution of the contract between MacPhail and the Creech Brothers Lumber Company.

The law is that the verified proof of claim is considered as testimony, and if unrebutted, it stands as a proven fact. When the claimant presents his proof of claim, the same constitutes proof, and the same must necessarily be allowed, as it is not the duty of the claimant to prove the allegations of his claim, but it is the duty of the objector to disprove the same.

Collier lays down the rules as follows: "A verified proof of claim will be considered as testimony

in behalf of the claimant; no inference is to be drawn from his failure to testify in his own behalf since he is subject to call by the court or contestant to explain his claim. The verified claim of the claimant has some probative force. It is prima facie of the evidence of allegations contained therein. Persons who object to the claim must produce some evidence in support of the assertion that the claim is invalid." Collier on Bankruptcy, 9th Ed., 738-9. Bauahauer vs. Austin, 26 Am. B. R. 385. 186 Fed. 260. Revg. 24 Am. B. R. 750, 179 Fed. 966.

In the case of Whitney vs. Dresser, 200 U. S. 532-50, Law Ed. 584, the Supreme Court held that the sworn proof of claim against a bankrupt estate is prima facie evidence of the allegations although objection is made under the Bankruptcy Act. The opinion is written by Justice Holmes who says in part: "The Circuit Court of Appeals observes that the proof of claim warrants the payment of dividends in the absence of objection, and therefore, must have some probative force. In reply it is urged that what is done in default of opposition is no test of what is evidence when opposition is made; that a judgment may be entered on a declaration for want of answer, yet a declaration is not evi-

dence; that it is contrary to analogy to give effect to an ex parte affidavit, and that on general principles, it is the right of any party against whom a claim is made to have it proved, not only upon oath, but subject to cross examination. Notwithstanding these forcible considerations, we agree with the circuit court of appeals." "The prevailing opinion not only in the second circuit, but elsewhere, seems to have been that way. The alternative would be that the mere interposition of an objection by any party in interest would require the claimant to produce evidence. For if the formal proof is no evidence a denial of the claim must have the same effect. If it does not, then the formal proof is some evidence, even when there is testimony on the other side."

"The words of the statute suggest, if they do not distinctly import, that the objector is to go forward, and thus that the formal proof is evidence even when put in issue." "It is the objection to the claim which is pointed out for hearing and determination. This indicates that the claim is regarded as having a certain standing already established by the oath. Some force also may be allowed to the word 'proof' as used in the act." Whitney vs. Dresser 200 U. S., 532, 50 Law Ed. 584.

"The presentation of a claim evidenced by promissory notes supported by deposition and proved or duly executed by the treasurer of a corporation, constitute a prima facie cause against the estate and cast the burden upon the objector to go forward with proof."

In the matter of Montgomery, 25 Am. B. R. 432, 185 Fed. 955.

In Re Caster, 15 Am. B. R., 1261, 138 Fed. 846.
In Re Cannon, 14 Am. B. R., 114, 133 Fed. 837.
In Re Summer, 4 Am. B. R., 123, 110 Fed. 224.
In Re Shaw, 109 Fed. 980.

It is incumbent upon the objector to disprove the allegations of the verified claim This the objector, who is petitioner and appellant in this case, has not done. He has introduced no evidence whatever in support of his objections to the proof of the claim, and in his objections he did not raise the question as to whether or not the waivers were signed by all of the creditors.

Second

It is very essential to remember that all of the then creditors of the Creech Brothers Lumber Company entered into a contract in writing with Mr.

MacPhail wherein they agreed that if he would take possession of the properties of the Lumber Company and advance money, and endeavor to operate the same, that all sums of money advanced by him, for the purpose of operating such plant should be a first lien upon the properties of the Creech Bros. Lumber Co., and that he should first pay himself for all moneys so advanced and paid, and pay any surplus, if any there be, over to the creditors in pro rata, share and share alike.

Mr. MacPhail bases his claim upon a contractual obligation, which contract was signed by all of the creditors of the corporation, and by the Willapa Harbor State Bank, which then owned the promissory note which now belongs to the U. S. National Bank of Centralia, and because of this claim Mr. Titlow, as Receiver of the U. S. National Bank of Centralia, is contesting the MacPhail claim.

It must be remembered that when the U. S. National Bank became the purchaser of the promissory notes, that it had full knowledge of all the circumstances and conditions upon which Mr. MacPhail was operating the plant of the Lumber Company. The Willapa Harbor State Bank of Raymond signed the creditors' agreement authorizing Mr. MacPhail to proceed in the manner in which he did. The U. S.

National Bank of Centralia, is successor in interest of the notes due from the Creech Brothers Lumber Company to the Willapa Harbor State Bank.

At the time the Willapa Harbor State Bank sold to the U. S. National Bank these obligations of the Creech Brothers Lumber Company, Mr. C. S. Gilchrist was President of the Willapa Harbor State Bank, and also the Vice President and Manager of the U. S. National Bank of Centralia. The Court will bear in mind that Mr. Gilchrist was one of the moving spirits in getting the creditors to sign this agreement with Mr. MacPhail, so the U. S. National Bank, when it purchased these notes, knew all of the facts and circumstances, and is the successor in interest of this claim of the Willapa Harbor State Bank. Is it possible that the U. S. National Bank, through its Receiver, Titlow, can now be heard to say that it had no notice or knowledge of the rights of MacPhail under these instruments while its own Vice President and Manager, Mr. Gilchrist, who was also the President of the Willapa Harbor State Bank, which signed the agreements, was the moving spirit in bringing about the assignment made by the Creech Brothers Lumber Company? (See Transcript of Record, pages 43-44). If so it may be truly said that a man may stand idly by,

and perpetrate such a fraud upon a man who acts in good faith for the benefit of all and can universally expect the courts to applaud his conduct.

Third-A.

The U. S. National Bank and Receiver thereof are Estopped from questioning MacPhail's Claim, after receiving a dividend on the bank's claim.

We believe that the law is that the United States National Bank, through its receiver, is now estopped to deny Mr. MacPhail's rights under his contract. Where the creditors of an insolvent corporation enter into a contract with an individual, agreeing with him that if he will take possession of the properties of the insolvent corporation, and conduct its business and operate its plants, and advance money for it, and that the moneys so advanced shall be first paid to him, and that he shall have a lien upon the properties of the corporation for all sums of money so advanced or expended by him in the operation, such creditors will not thereafter be permitted to repudiate such a contract, nor to question the priority of the claim of the individual who advanced the money; and they are estopped from questioning the validity or the priority of the claim of the party who, at their

instigation and under a contract with them, expended the funds.

Where the creditors of an insolvent corporation enter into a written contract with another person and agree with him that if he will advance money for the corporation, and conduct its affairs, and that the moneys so advanced by him shall be first paid, and shall be a prior lien upon the properties of the corporation, such creditors and their successor in interest may not repudiate such a contract, nor prevent the party who advanced the money under such a contract from having his claim first paid. They are estopped. Courts will not permit creditors to perpetrate such a fraud upon an individual.

Davis vs. Iowa Fuel Co., 122 N. W. 815, 24 L. R. A. (N. S.) 1166.

The above case has a case note. The case above cited we consider to be parallel to the case at bar. See also:

Gautier vs. Douglas Mfg. Co., 9 N. Y. S. R. 310.

Queen Anne's Ferry & Equipment Co. v. Queen Anne's R. Co., 138 Fed 41, affirmed in 162 Fed. 828.

Bank of California v. Puget Sound Loan, T. & Bkg. Co., 20 Wash. 636, 56 Pac. 395.

American Exchange National Bank of New York

City, vs. Ward, 111 Fed. 782.

McAvoy v. Jennings, 39 Wash. 109.

In the case entitled, Bank of California vs. Puget Sound Loan Trust & Bkg. Co., 20 Wash., 636, the facts and the decision of the Court are well stated in the syllabus of that case, and the syllabus is as follows:

> "Creditors of a bank in the hands of a receiver who consent to the discharge of the receiver and the re-opening of the bank, under an arrangement whereby one of the creditors is to advance money to the bank for the purpose of enabling it to resume business and partially pay outstanding claims, are estopped from claiming they had no notice of a mortgage for an antecedent indebtedness being given in consideration of such advance, when they have agreed to an extension of the time in which the bank might pay their claims, and have received dividends thereon out of the moneys so advanced; and they are also equitably estopped from setting up the insolvency of the bank at the time of the discharge of the receiver, for the purpose of showing that the giving of the said mortgage constituted a fraudulent preference.
>
> "The subsequent insolvency of a corporation cannot be given in evidence for the purpose of affecting the validity of a prior instrument, which was valid at the time of its execution.
>
> "Where general creditors have for more than a year acquiesced in an order of the court discharging a receiver and permitting an alleged insolvent bank to resume business, they

cannot be heard to object that the receiver did not represent them at the hearing."

In the above case the Supreme Court of Washington, on page 642 says:

"Such agreement, as heretofore stated, was presented to the superior court, and that court discharged its receiver, and directed all the property of the bank to be returned to its officers who had been named in the agreement between the creditors and stockholders; and the appellant advanced $7,500 under the agreement to the defendant bank, which, as observed, was used in paying the dividends which were paid to the other consenting creditors, appellant receiving no dividend at any time. The superior court, over the objection of counsel for appellant, admitted much evidence tending to show the insolvency of the defendant bank at the time the order discharging the receiver was made, in November, 1894. We think this was error. In view of the order discharging the receiver theretofore made by the superior court, and the agreement of the creditors which was before the court at that time, the question of the solvency or insolvency of defendant bank became immaterial; and we conclude that the facts shown constitute an equitable estoppel against the consenting creditors, and they may not now set up the insolvency of the defendant bank at the time mentioned in November, 1894, or prior thereto."

The case of Davis v. Iowa Fuel Co. (Iowa, 122 N. W. 815, 24 L. R. A. (N. S.) 1166, is parallel to the

case at bar. The facts of the case as stated by the court are:

"On July 19, 1906, the defendant Iowa Fuel Company was an insolvent corporation. It had been engaged in the retail coal business at Sioux City for some time next preceding such date. On such date it was indebted to various creditors in a total amount of about $4,000, and its total assets had a value of about $2,000. On the date named all the then existing creditors of the corporation entered into an agreement with each other and with such corporation, whereby it was proposed to conduct the business of the corporation in such a way as to enable it in time to pay the creditors involved. It was therefore agreed by all of the parties to this agreement that the business of the Iowa Fuel Company, with all of its property and assets of every kind, be placed in the hands of C. S. Graham, who is agreed upon as a trustee 'to take possession and charge of said business and of the property and assets belonging thereto, and conduct the same for a period of one year from this date.' It was provided in such contract that the trustee should receive $75 per month, that he should execute to the creditors a bond in the sum of $1,000, and that one Fields should be the agent of the creditors 'to supervise the conduct of the business as carried on by said trustee,' and 'to decide the amount of expense which may be incurred by the said trustee in carrying on said business.' It was also provided: "Whenever, in the judgment of said Field, there are sufficient funds on hand over and above the amount necessarily expended for current expenses, the same shall be distributed among the different creditors pro rata.' It was also pro-

vided that all funds should be deposited in the name of 'W. S. Graham, trustee,' and that all disbursements should be made by checks drawn in the same way. From such date the business was conducted by the trustee in pursuance of such contract. As such trustee he purchased coal from the appellees in large quantities, and sold the same in the course of trade. The joint enterprise so undertaken by the creditors did not prove successful, and a receiver was finally appointed for the corporation. The person who was so appointed as receiver was W. F. Tuttle, one of the creditors who had entered into the agreement of July 19, 1906. He converted the assets of the corporation into money. This controversy arose over the final order of distribution. Those creditors whose claims of indebtedness were incurred by Graham, trustee, in the conduct of the business since July 19, 1906, demanded that the assets in the hands of the receiver be first applied to the payment of their claims so incurred by the trustee. The trial court so ordered. The other creditors have appealed from such order."

On the above state of facts the Court in that case said:

"The case is so unique in its facts that no precedents can be cited to aid us. On principle, however, we are well satisfied with the conclusion reached by the trial court. It is urged by the appellants that all creditors should stand on an equality. Their argument is that Graham was the former manager of the Iowa Fuel Company and one of its principal stockholders, and that he conducted the business as before, and that there was, therefore, no substantial change,

and that the new creditors extended credit to the corporation as the former creditors had done. It is argued that the former creditors simply forebore litigation, and that they should not be penalized therefor. But the premise of fact upon which such argument is based is not sustained by the record. The insolvent corporation surrendered its dominion over its property to the creditors, who undertook to manage it more economically and successfully than had previously been done. Their motives were commendable. But the fact remains that they entered into the joint enterprise, and that they put the property and business into the hands of a trustee, who was directly accountable to them, and from whom they required a bond, and to whom they stipulated a compensation. True, they stipulated against personal liability. But they forebore to apply the property to the payment of their claims, and they put it up as a capital for the time being, and sent their trustee into the commercial world to purchase merchandise upon the faith of it. Such purchases of merchandise were absolutely essential to the conduct of the enterprise. No merchandise could have been bought upon the credit of an insolvent corporation except by deception. Surely no fraud or deception was contemplated by the parties. It may be doubted whether the appellees are strictly creditors of the insolvent corporation, in the ordinary sense. Certain it is that they are creditors of the trustee, and the trustee was the creation of the appellants. Under the facts appearing here, the elementary principles of equity require that the claims of the appellants be postponed to those which were made in their behalf by their trustee."

We believe that the case of the American Exchange National Bank of New York City vs. Ward, 111 Fed. Rep. 782, (C. C. A.) is parallel and quite similar to the case at bar. In that case the facts are fairly well stated in the syllabus, which is as follows:

> "A mercantile corporation had four unsecured creditors, three of whom, holding much the larger part of its indebtedness, as well as all of its preferred stock, by agreement with the common stockholders obtained the election of their representatives as directors and manager; the purpose being to secure a change of management because the business of the company had become unprofitable. The fourth creditor was advised of such action, and made no objection. Such creditors remained in control for 2 1-2 years, during which time they paid the fourth creditor one-third of its claim, but increased the indebtedness of the corporation to themselves by advancing money for its use. It did not appear that any new outside indebtedness was created. At the end of that time, the business having remained unprofitable without the fault of the management, the directors had a chattel mortgage and trust deed executed conveying the property of the corporation to secure its creditors; preference being given to the claims of the controlling creditors. There was no evidence of fraud or bad faith, but, on the contrary, the evidence justified the inference that their action in assuming control was for the purpose of benefitting the corporation and all of its creditors. Held, that there was neither actual nor constructive fraud in the transaction which

rendered the preference voidable by the fourth creditor, who was not injured, but was in fact the only one of the four benefitted, by the transaction."

McAvoy v. Jennings, 39 Wash. 109, was a case where a co-partnership entered into a contract with one Jennings, and the agreement substantially provided that, whereas, the co-partnership business had become indebted to various persons and firms, and in order to endeavor to pay the claims which the co-partnership business owed, all of the property of the co-partnership was transferred to Jennings, with authority by Jennings to sell the property and collect the accounts, and after deducting the expenses of administering the trust, to apply the proceeds arising from said sale and collections ratably to the claims of all creditors mentioned. Immediately after the execution of the agreement Jennings took possession of the property mentioned, and afterwards sold the tangible property and proceeded with the collection of the book accounts of the co-partnership. The American Savings Bank & Trust Company was one of the creditors, and after the transfer to Jennings had been made, the bank assigned its claim to McAvoy, who thereupon commenced an action in the Superior Court of King County to reduce the

claim to judgment against the members of the co-partnership, and in that action McAvoy caused Jennings to be summoned as a garnishee defendant.

In that action Jennings appeared in the garnishment proceeding and answered, denying that he was indebted to said co-partnership or any member thereof, and denying that he had any property in his possession or under his control belonging to the defendants in the action; and by way of further answer alleged the trustee agreement above mentioned; and alleged that he had taken possession of all the property therein stated, and had converted the same into money, and that this money he was prepared to distribute pro rata among the creditors in accordance with the said agreement.

The plaintiff filed a reply denying the allegations in the answer, and alleged that the agreement and transfer of the property to Jennings was fraudulent and void as to the creditors.

The Court in passing upon the case said:

> "Conceding, for the purpose of this appeal, that the transfer is void as to the creditors not parties thereto, without intending to decide that question the judgment of the lower court should be reversed."

The Court said: "It is clear that if the

transfer of the co-partnership property was made to the appellant by the co-partnership, at the instigation of the creditors, for the purpose named, the transfer was not void as between the parties. A creditor, who was a party to the transfer and at whose instance and for whose benefit the transfer was made, cannot be permitted to say that it was fraudulent as to him, or that, because it was fraudulent as to some other creditors, he may take advantage of his own wrong and thereby obtain a preference by attachment or garnishment."

The above case is very parallel to the case at bar and sustains the principle that the claim of MacPhail is a prior claim.

In the Memphis Savings Bank vs. Houchens, 115 Fed. 96, the principles involved are much the same as the principles involved in the case at bar, and the Court said:

"The case in hand is similar, in most respects, to one recently decided by the supreme court of Arkansas. Martin v. Taylor, 52 Ark. 389, 400, 12 S. W. 1011. In that case it appeared that, after a firm had become insolvent and certain attachments had been levied on its property, the creditors of the firm entered into an agreement among themselves and with the members of the firm, whereby all of the firm property was conveyed to certain assignees, who were vested with the power to sell and dispose of the same and distribute the proceeds among the creditors of the firm, preferences being allowed in favor of certain attaching creditors. Sub-

sequently one of the attaching creditors became discontented, and erased his name from the agreement, and then sought to ignore it, and enforce his attachment lien, on the ground that under the laws of Arkansas the agreement amounted to a general assignment for the benefit of creditors, and was void on its face. It was held, however, that the persons who thus attempted to assail the agreement, being parties thereto, and having assented to it, were estopped from challenging its validity. In the case of Paxson v. Brown, 27 U. S. App. 49, 59, 10 C. C. A. 135, 142, 61 Fed. 874, 880, this court applied the same doctrine, holding, in substance, that after creditors had become parties to a voluntary assignment, executed outside of the State of Arkansas, which was good at common law, and had accepted dividends thereunder, which had been paid by the assignee, they could not repudiate the assignment on the ground that the assignment was inoperative, and that acts done thereunder were void, because the assignee had not filed a bond and inventory, as the laws of Arkansas required. It is held very generally, and the authorities on this point may be said to be uniform, that creditors who have confirmed an assignment, which might have been avoided, by receiving benefits under it, or who have voluntarily become parties to it with full knowledge of all the facts attending its execution, are afterwards estopped from impeaching it. They cannot play fast and loose, but must make their election to repudiate it before they have accepted any benefits thereunder or by their acts have become parties to it.

Adlum v. Yard, 1 Rawle, 163, 171, 18 Am. Dec. 608;

Valentine v. Decker, 43 Mo. 583;

Rapalee v. Stewart, 27 N. Y. 311;

Glass Co. v. Baldwin, 27 Mo. App. 44;

Harrison v. Mock, 10 Ala. 185;

Stoller v. Coates, 88 Mo. 514, 521, 522, 523;

Burrill, Assignm. (6th Ed.) Sec. 454.

"This doctrine, without doubt, is applicable to the case in hand and, even if it be conceded that the appellants might have attached the lands in controversy after the execution of the deed of assignment, yet it is clear that they cannot be conceded any such right after becoming parties to the composition agreement, and after consenting that the lands conveyed to Trezevant, as trustee, might be held as security for the payment of the composition notes. Such consent, voluntarily given, estops them from seeking to appropriate the proceeds of those lands exclusively to the payment of their own claims, without reference to the rights of the other creditors."

In Tiffany v. Boatman's Sav. Inst. 18 Wall. (U. S.) 375, 21 L. Ed. 868:

"It is not difficult to see that in a season of pressure the power to raise ready money may be of immense value to a man in embarrassed circumstances. With it he might be saved from bankruptcy, and without it financial ruin would be inevitable. If the struggle to continue his business be an honest one, and not for the fraudulent purpose of diminishing his assets, it is not only not forbidden, but is commendable, for every

one is interested that his business should be preserved. In the nature of things he cannot borrow money without giving security for its repayment, and this security is usually in the shape of collaterals. Neither the terms nor the policy of the Bankrupt Act are violated if these collaterals be taken at the time the debt is incurred. His estate is not impaired or diminished in consequence, as he gets a present equivalent for the securities he pledges for the repayment of the money borrowed. Nor in doing does he prefer one creditor over another, which it is one of the great objects of the Bankrupt Law to prevent. The preference at which this law is directed can only arise in case of an antecedent debt. To secure such a debt would be a fraud on the Act, as it would work an unequal distribution of the bankrupt's property; and therefore, the debtor and creditor are alike prohibited from giving or receiving any security whatever for a debt already incurred, if the creditor had good reason to believe the debtor to be insolvent. But the giving securities when the debt is created is not within the law, and if the transaction be free from fraud in fact, the party who loans the money can retain them until the debt is paid. In the administration of the Bankrupt Law in England this subject has frequently come before the courts, who have uniformly held that advances may be made in good faith to a debtor to carry on his business, no matter what his condition may be, and that the party making these advances can lawfully take securities at the time for their repayment. And the decisions in this country are to the same effect."

Third-B.

The U. S. National Bank and Receiver thereof are Estopped from questioning MacPhail's Claim, after receiving a dividend on the bank's claim.

We do not care what name may be given to the instruments executed by the Creech Brothers Lumber Company and the creditors thereof, surrendering the property of the Lumber Company to MacPhail. We do know that MacPhail took the property under these instruments and went into the possession thereof, and advanced and expended his money in an endeavor to benefit all the creditors. If the instrument be denominated an assignment for the benefit of creditors, even then the creditors who signed the agreement and their successors in interest, and the creditors who received dividends are estopped from questioning MacPhail's rights under those instruments. In the state of Washington, an insolvent corporation may make a common law assignment.

Nyman vs. Barry, 3 Wash. 734.

McKay vs. Elwood, 12 Wash., 579.

Damon vs. Leque, 14 Wash., 249.

In Damon vs. Leque, 14 Wash., 249, the Court says:

> "The fact that we have held that an insolvent corporation in this state cannot make a statutory assignment, avails appellant nothing. Such a corporation may make a common law assignment."

And in Olsen vs. Bank of Tacoma, 15 Wash., 150, the Court said:

> "That an insolvent corporation can make an assignment of all its property, which might well be called a common law assignment, and which will have the effect of transferring to the assignee title to the property, for said proposition has been repeatedly held by this court."

MacPhail's rights rest upon a contractual obligation wherein the corporation and all of the creditors thereof agreed that if he would attempt to operate the business of the Creech Brothers Lumber Company, and endeavor to keep it a going concern for the benefit of the creditors of the corporation, that all sums of money advanced by him for the purpose of operating such plant should be a first lien upon the properties of the Creech Brothers Lumber Company and that he should first pay himself for all moneys so advanced, and pay the surplus if any there be, to be paid, over to the creditors in pro rata, share and share alike. This was a solemn contractual obligation, which the predecessor in interest of

the U. S. National Bank agreed to; and the U. S. National Bank purchased its claim from a creditor who had signed this agreement, and when it purchased, it knew all of the facts and had notice thereof. And the U. S. National Bank received from MacPhail a dividend on its claim.

It will be remembered in this connection that MacPhail paid out his money in order that the policies of insurance on the property would not be cancelled, and that he paid the taxes on the property of the corporation to save it from being sold for delinquent taxes. Has he no rights in the premises? May the creditors enter into such a contract and after he has spent his money for their protection, then repudiate their solemn agreements, and say to him, "You were foolish, and will take nothing. We perpetrated a fraud upon you, but the Courts will not protect you." Such is not the law.

See authorities heretofore cited and also
Paxson vs. Brown, 61 Fed. 874.
Memphis Savings Bank vs. Houchins, 115 Fed. 96.

In 61 Fed. 874, particularly on page 880 and 881, the Court says:

"It was a valid assignment at common law, and it was perfectly competent for the debtors, the assignees, and all the creditors to agree that the property of these debtors should be conveyed to the assignees in trust to be sold at private sale, and that the proceeds thus realized should be applied to the payment of the claims of the creditors, without a compliance with the assignment laws of these states. These laws were enacted for the benefit of the parties to such assignments, but all of these parties might, by agreement, waive the benefit of such laws. Thus the parties to this assignment did. The debtors conveyed the property to the assignees to be sold for the benefit of the creditors. The assignees accepted and executed the trust. The creditors accepted the benefits of it, and received therefrom 20 per cent. of their claims. Can any of these parties, after the execution of this trust, and while they still retain the benefits derived from its execution, repudiate the assignment, and recover back from the purchaser the lands the proceeds of which they enjoyed?"

It will be remembered that in this particular case the Willapa Harbor State Bank, who then owned the claim which the U. S. National Bank now owns, received a dividend of ten per cent from MacPhail, the dividend being profits arising from the operation of the plant. Can such an agreement now be repudiated by the U. S. National Bank? In the above case the court also says:

"No principle is more salutary, none rests

> on more solid foundations, than that one who by his acts or representations, or by his silence when he ought to speak out, intentionally or through culpable negligence, induces another to believe certain facts to exist, and the latter rightfully acts on such a belief, so that he will be prejudiced if the former is permitted to deny the existence of such facts, is thereby conclusively estopped to interpose such denial. This principle is salutary, because it represses fraud and falsehood."

In the case of Taylor v. Seriler, 100 Ill. App. 643, affirmed in 65 N. E. 433, it was held that creditors who file a claim with the assignee, and receive dividends from the assigned estate, cannot be permitted to repudiate it, and at the same time enjoy the benefits of the assignments.

In case of Reassignment of Geo. T. Smith M. Purifier Company, 48 N. W. 864, (Mich.) the Court held that the right of a creditor to complain of an assignment for the benefit of creditors in the execution of which there may have been fraud as to creditors, may be secured by waiver or acquiescence; the court taking the view that having come is under the assignments in such a way as to entitle him to a share in the dividends arising from the assets in the hands of the assignee, such creditor waives all objections to his title to such assets.

In Dickerson v. Colgrove, 100 U. S. 578, 25 L. Ed. 618, the Court said:

> "The estoppel here relied upon is known as an equitable estoppel, or estoppel in pais. The law upon the subject is well settled. The vital principle is, that he who, by his language or conduct, leads another to do what he would not otherwise have done, shall not subject such person to loss or injury by disappointing the expectations upon which he acted. Such a change of position is sternly forbidden. It involves fraud and falsehood, and the law abhors both. This remedy is always so applied as to promote the ends of justice."

In the case of Lanahan vs. Latrobe, 7 Md. 268, the Court held, that the creditor who claims a share in the proceeds of a sale under a deed of trust, makes himself so far a party to such deed as to lose his right to deny its validity.

In Swanson vs. Tarkington, 54 Tenn. 612, the court held, that a party accepting the provision of a deed of trust for his benefit, affirms the instrument in toto and is estopped from impeaching any of its provisions for the benefit of other parties.

In Adlum v. Yard, 1 Rawle, 163, the Court said: "that creditor might originally have repudiated the assignment, but having taken a dividend under it, he should no longer question its validity."

In Rapalee v. Stewart, 27 N. Y. 310, the Court held, that it would be a fraud upon all the other creditors to allow one who had assented to the assignment to repudiate it, and thereby gain a preference and secure his entire debt.

In Chafee v. Fourth National Bank, 71 Maine, 36 Am. Rep. 345, the court said: Personal privileges may undoubtedly be waived, although secured by the positive provisions of a statute; and when a creditor, to whom the law secures the right to avoid an assignment made by his insolvent debtor assents to the assignment, or knowingly avails of the benefits thereby secured to him, we think he thereby waives his right to treat the assignment as void.'

In Bodley v. Robbins, 7 Howard 276, 12 L. Ed. 699, the Supreme Court of the United States held that where a creditor acquiesces in the assignment or receives a benefit or a dividend, that he may not question the transaction.

In Jencks vs. Quidnack Co. 135 U. S. 457, 34 L. Ed. 200, the Supreme Court of the United States held:

"Where a debtor, having large and scattered properties, and being much embarrassed,

transfers his property for the benefit of his creditors equally, equity requires that any creditor who is not satisfied with the provisions of such transfer shall act promptly in challenge thereof, or else be adjudged to have waived any right of challenge."

In that case the court further said:

"We do not feel called upon to decide, as a question of absolute law, whether the conveyance was or was not valid, and beyond challenge. It is for the purpose of this case that it was with the general acquiescence of the creditors; that its purpose was equally between them; that it was not challenged for many years; that the trustee, on the faith of its validity, carried on business to an enormous extent and assumed large liabilities; and **that the creditors accepted payments made out of the proceeds of that business, and the trust created by this conveyance.** Equity will not reach out its hands to disturb that which all parties have considered settled for so many years."

Fourth.

MacPhail has an Equitable Lien By Contract.

The Creech Brothers Lumber Company was not adjudged a bankrupt until about two years after the execution of the contracts by the corporation and by the creditors transferring the property of the Lumber Company to MacPhail. Under the contract MacPhail immediately entered into

possession of the property. It is not necessary to record such instruments, especially where MacPhail took possession of the property, as he did in this case.

It must also be borne in mind that the U. S. National Bank is not a subsequent creditor, nor a purchaser. The claim which it owns was owned by the Willapa Harbor State Bank at the time of the execution of these contracts, and the Willapa Harbor State Bank was one of the creditors who signed the contract; and as we have heretofore shown the U. S. National Bank had notice of these contracts, and knew that MacPhail was in possession of the property thereunder, and received a dividend of ten per cent. on its claim from MacPhail. The fact that the U. S. National Bank is not a "subsequent creditor" is quite material, and neither did it ever obtain any lien upon the property of the Creech Brothers Lumber Company for its claim. The lien in favor of MacPhail created by the contracts is an equitable lien which the courts recognize, and enforce, and especially do the bankruptcy courts enforce such a lien.

> "An equitable lien enforceable against the trustee in bankruptcy may be created by agreement."

1 Loveland on Bankruptcy, Sec. 460, and the authorities there cited.

In re Pittsburg Industrial Iron Works, 179 Fed. 151.

Goodnough Mer. & Stock Co. vs. Galloway, 171 Fed. 940.

Duplan Silk Co. vs. Spencer, 115 Fed. 689.

In re Levin, 173 Fed. 119.

In 179 Fed. 151, Supra, the Court held:

"An equitable lien is created where a bank, to enable the bankrupt to proceed with the manfacture of a car contracted for, advanced the full price of the contract to the bankrupt, giving notice of the advancement to the vendee, who promised to pay the bank, and when the vendee refuses the car, the bank may take and hold it for its lien created beyond the four months' period."

"A transfer of property by an insolvent to a creditor with consent of all his other creditors, is not a preferential sale which can be set aside by the trustee."

1 Loveland on Bankruptcy, Sec. 528.

In re Miller, 1 Br. Rep. 410.

In Judson vs. Courier Company, 8 Fed. Rep. 422, the court said:

"It is plain, moreover, that neither the

words nor policy nor intent of the bankrupt act forbid any settlement by a debtor with his creditors, nor any disposition of his property, to which all his creditors assent. In re Miller, 1 B. R. 410. In providing for the disposition of the bankrupt's estate through trustees, to be chosen by the creditors and subject to the direction of a committee appointed by them, the bankrupt act itself (Section 5103) recognizes the controlling power and interest of even less than the entire body of creditors. An omission of a creditor's name from the schedule of creditors, if made with the creditor's assent, has been held not to be a 'wilful or fraudulent' omission. In re Needham, 2 B. R. 387. A transfer is not, then, a fraud upon the act if made with the consent of all persons in interest fairly obtained, however unequal in its results the transfer may prove. Such a consent is a virtual waiver of all the benefits of the bankrupt act, and, when acted on by the transferee, is an estoppel against subsequent incompatible claims under the act. In re Williams 14 B. R., 132, 136; Johnson v. Rogers, 15 B. R. 1; In re Langley, 1 B. R. 559, 565; In re Schuyler, 2 B. R. 549; In re Kraft, 3 Fed. Rep. 892. For the same reason a grantee cannot be held to 'know' a transfer to be a fraud upon the act if it is assented to by all the creditors known to him, or that upon reasonable inquiry he might and would have ascertained or have had reason to suspect."

The contract was good as between the corporation and MacPhail, and it is equally valid as against every creditor who consented to or joined in the execution of the contract, and those who received a

dividend from MacPhail. Such is the equitable rule, and it is based upon common sense and is just.

In Hurley vs Atchinson & Topeka R. R. Co., 213 W. S. 126, 53 L. Ed. 729, the Supreme Court of the United States held that:

> "Where a railroad to assist a coal company in going on, advances money for coal to be mined, the court construed the arrangement as a pledge of a sufficient amount of coal after it should be mined, as security for payment of advances made. 'Equity looks at the substance and not at the form. That the coal for which this money was advanced was not yet mined, but remained in the ground to be mined and delivered from day to day as required, does not change the transaction into one of an ordinary independent loan on the credit of the coal company or upon express mortgage security. It implies a purpose that the coal as mined should be delivered, and is from an equitable standpoint to be considered as a pledge of the unmined coal to the extent of the advancement. The equitable rights of the parties were not changed by the commencement of bankruptcy proceedings. All obligations of a legal and equitable nature remained undisturbed thereby. If there had been no bankruptcy proceedings, th coal as mined was, according to the understanding of the parties, to be delivered as already paid for, by the advancement."

Where a bank loans money to a bankrupt to buy cattle on his verbal promise to give it a lien on

the proceeds from the sale of those cattle, this creates a lien enforceable in bankruptcy. Gardner v. Planters National Bank (Texas 1909) 118 S. W. 1146. The contract was more than four months before bankruptcy and the payment within four months.

An agreement that the creditor should have a present security upon property sold to be manufactured into lumber constituted an equitable lien which attended the property, the logs, and the lumber manufactured from such logs as "equity looks upon things agreed to be done as actually performed." The creditor's lien attends the funds in the hands of the trustee in bankruptcy, and the attachment of another creditor was rendered void by bankruptcy where no attempt was made to preserve it for the estate. Goodnough Mercantile & Stock Co. v. Galloway, 171 Fed. Rep. 940, 22 Am. B. R. 803.

Fifth

Possession of the property of the Creech Bros. Lumber Co. was taken by MacPhail in Nov. 1912 and possession retained by him until a receiver was appointed, and therefore, it was not required that the contract be recorded.

It must be remembered that Mr. MacPhail immediately after the execution of the contract in Oc-

tober, 1912, took possession of all the properties of the Creech Brothers' Lumber Company and operated the saw mill and plant. This was known to the United States National Bank of Centralia of which the petitioner and appellant is receiver. This gave MacPhail a good title to the property and was notice to all the world of his rights under the contract, or written instrument, although, the instrument under which he claimed was not recorded.

Crooks vs. Jenkins, (Iowa) 100 N. W. 82 104 Am. St. Rep. 326 where the authorities are collected in a note.

> "Actual possession of real estate is constructive notice of the party's rights."

Dennis v. Northern Pacific R. Co., 20 Wash. 320 55 Pac. 210.

> "A purchaser of land with actual knowledge that a portion thereof is in the occupancy of other parties than the grantor, has notice sufficient to put him on inquiry as to the rights of such occupants, and is bound to inquire both as to their tenure and the quantity of land thereunder, although such occupants may be in possession of an uninclosed tract under an unrecorded deed."—Kuhl v. Lightle, 29 Wash. 137, 69 Pac. 630.

Watson v. First National Bank, 82 Wash. 65.

Humphrey v. Yateman 198 W. S. 91, 49 Led. 956.

In the case last cited the Supreme Court of the United States says:

> "Taking possession of mortgaged property under an unrecorded chattel mortgage, does not amount to a preference voidable by the mortgagor's trustee in bankruptcy, although such action was taken within four months of the bankruptcy proceedings, if possession so acquired is good as against the trustee under the state laws."

In Watson v. First National Bank, 82 Wash. 65, the Supreme Court of Washington says:

> "A chattel mortgage not recorded as required by statute (Rem. & Bal Code of Washington, Sec. 3660 (P. C. 349 3) while void as to creditors who have acquired some form of lien upon the mortgaged property, is, valid as between the mortgagor and the mortgagee.."

In Heal v. Evans Creek Coal & Coke Co., 71 Wash. 225, 128 Pac. 211, it was said:

> "Whether properly recorded or not, the mortgage was valid as between the mortgagor and mortgagee, and it is only creditors who have acquired some form of lien upon the mortgaged property that can question the right of the mortgagee to foreclose against such mortgaged property."

Where the mortgage is executed and delivered, and prior to the time of its being recorded, persons

other than the mortgagee become general creditors of the mortgagor, but do not become lien creditors until after the mortgage is filed for record, the right of the mortgagee are superior to those of such general creditors. The mortgage speaks as of the date it is placed of record. In Pacific Coast Biscuit Co. v. Perry 77 Wash. 352, 137 Pac. 483, it was said:

> "The conceded facts in this case show that the Pacific Coast Biscuit Company had no specific lien upon any property of the mortgagor at the time the mortgage was filed for record on September 7, 1911. Up to that time, under many decisions of this court, the mortgage was void as to creditors. But when it was filed for record, and when the mortgagee took possession of the property, as he did in this case, his lien became perfect and superior to the claim of the other creditors having no specific lien. We think there can be no doubt of the correctness of this position under the statute.
>
> "In so far as the case of the Willamette Casket Co. v. Cross Undertaking Co., supra, may be said to hold that an unrecorded mortgage is absolutely void and may not become valid when properly filed, that case must be overruled. Under the conceded facts in this case, we think it is clear that the appellant, by reason of recording his mortgage prior to the judgment of the Pacific Coast Biscuit Company, obtained a first lien upon the property covered by the mortgage; and the sale thereof under his mortgage, being regular, passed title to the appellant and, that Oswald had no further interest in the property."

"**Where the mortgagee takes possession of the property covered by an unrecorded chattel mortgage, the mortgage speaks as of the date when possession was taken.** From that time, the mortgage is valid as to all creditors who have not, prior thereto, acquired a right to the specific property or a lien thereon. First Nat. Bank of Fergus Falls v. Anderson, 24 Minn. 434; First National Bank of Madison v. Damm, 63 Wis. 249, 23 N. W. 497; Martin v. Holloway, 16 Idaho 513, 102 Pac. 3, 25 L. R. A. (N. S.) 110; Gagnon v. Brown, 47 Kan. 83, 27 Pac. 104; Garrison v. Street & Harper Furniture & Carpet Co., 21 Okl. 643, 97 Pac. 978, 129 Am. St. 799; Cameron Hull & Co. v. Marvin, 26 Kan. 612."

In the last case cited, speaking upon this question, it was said:

"And if the mortgagee, whose mortgage is not recorded, and who does not have possession of the property, records his mortgage with the consent of the mortgagor, takes possession of the property with the consent of the mortgagor, his mortgage then has the force and effect of a mortgage executed on the day which it is filed for record, or on which the property is delivered. It is the same then as though a new mortgage had been executed by the parties and recorded. The old mortgage is then given life and force and effect by the joint action of both parties, and hence must be held to be valid from that time on, as against all persons."

"In the present case, the possession was taken under the unrecorded mortgage prior to the time when the appellant recovered its judgment and levied execution thereon. Under the

> authorities above referred to, the rights of the respondent by virtue of the mortgage and the possession taken thereunder were superior to those of the appellant, who became a general creditor prior to the taking of the possession, but did not reduce its claim to judgment until subsequent thereto."

In this case MacPhail entered into the possession of the property and operated the mill plant and retained possession until the corporation was placed into the hands of a receiver and adjudged a bankrupt.

The U. S. National Bank of Centralia received a dividend from MacPhail, profits arising from the operation of the plant. The instrument was not required to be recorded by the laws of the state of Washington, but even if it was required to be recorded, possession of the property obviated the necessity of recording.

Sixth.

Present Consideration.

The contract or instrument in writing between the Creech Brothers Lumber Company—under which MacPhail took possession of the property, whether you construe it as a mortgage, deed of trust or an assignment—was and is valid. Mort-

gages made in good faith and for a present consideration are valid.

Thompson vs. Fairbanks, 196 U. S. 516, 49 L. Ed. 577.

Humphrey v. Tatman, 198 U. S. 91, 49 L. Ed., 956.

Tiffany v. Boatman's Sav. Institute, 18 Wall. 375, 21 L. Ed. 868.

1 Loveland on Bankruptcy, Sec. 470.

We wish you to remember that MacPhail was in possession of this property under his contract for a period of about two years before the Creech Bros. Lumber Company was adjudged a bankrupt and before the filing of a petition for such adjudication.

The District Court found from the evidence as follows:

That during the operation of the mill MacPhail paid something like over ten per cent. of the claims of the creditors; paid over $3,000 in insurance; over $2,000 in taxes; and upon the mill being closed down, after having paid for all the logs, amounting to over $93,000, and for labor amounting to over $46,000, together with other items necessarily disbursed, he found that he had expended $13,877.74 more than he had received.

Finding of Fact No. 6, P. 59, Transcript.

Justice and equity affirm that MacPhail should be allowed as a preferred claim the moneys expended by him on behalf of Creech Brothers Lumber Co. and the creditors thereof. He benefitted the corporation, preserved its properties, and paid the creditors ten per cent of their claims. He kept the property from being sold for delinquent taxes, and never asked for nor received any compensation for his personal services. His contract was valid when made, and it would be unjust and inequitable to permit the receiver of the U. S. National Bank to repudiate the transaction after the lapse of over two years, and after receiving from MacPhail ten per cent of its claims, arising from profits made when MacPhail was operating the saw mill plant under the contract.

We submit that the judgment of the District Court allowing MacPhail a preferred claim for the moneys expended by him, should be affirmed, and that MacPhail recover his costs and disbursements herein.

JOHN T. WELSH,
MARTIN C. WELSH,
Attorneys for Respondent and Appellee.

Office Address, Rooms 1-3, Welsh Building, South Bend, Washington.

No. 2827

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

IN THE MATTER OF CREECH BROTHERS LUMBER COMPANY, a corporation,

Bankrupt.

APPEAL AND REVIEW FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION.

REPLY BRIEF OF APPELLANT AND PETITIONER FOR REVIEW.

R. P. OLDHAM,
R. C. GOODALE,
Attorneys for Appellant and Petitioner,
WALTER L. NOSSAMAN,
Of Counsel,
1408 Hoge Building,
Seattle, Washington.

SHERMAN PRINTING & BINDING CO., SEATTLE, WASH.

FILED
SEP 11 1916
F. D. MONCKTON

No. 2827

In the United States Circuit Court of Appeals

For the Ninth Circuit

IN THE MATTER OF CREECH BROTHERS LUMBER COMPANY, a corporation,

Bankrupt.

APPEAL AND REVIEW FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION.

REPLY BRIEF OF APPELLANT AND PETITIONER FOR REVIEW.

A large portion of the respondent and appellee's brief is based upon the assumption that this proceeding is brought by the receiver of the United States National Bank, one of Creech Brothers' creditors (Appellee's brief, 21, 42). While the case is brought to this court by Titlow, Receiver of the United States National Bank, he is acting *in the name of the trustee in bankruptcy under leave of court.* The rights here

asserted are *those of the trustee.* The objections to the allowance of the MacPhail claim were filed with leave of court first obtained for and in behalf and in the name of the trustee (50, 65). The right to so file objections is conferred by the Bankruptcy Act, Sec. 57 d and k, General Order in Bankruptcy, Nos. 21, 6. The practice of permitting objections to be filed and appeals taken by creditors in the name of the trustee where the trustee refuses to act is common.

1 *Loveland on Bankruptcy,* Secs. 347-349;
Ohio Valley Bank vs. Mack, 163 Fed. 155, C. C. A., 6th Cir.;
Chatfield vs. O'Dwyer, 101 Fed. 797, C. C. A., 8th Cir.

Obviously the purpose of permitting creditors to file objections to the allowance of claims is to provide an additional safeguard against fraudulent or negligent inaction on the part of the trustee himself. The purpose of the bankruptcy act would be defeated if the bankrupt or some favored creditor could, by finding fault with the creditor assuming for the time being the burden of representing all the others, defeat the rights of the trustee who, charged with the duty of protecting the estate, represents the innocent as well as the guilty. Leave of court having been once granted that certain objections be filed *in the name of the trustee, all the creditors* have a right to rely on such

objections. Is it to be said that after the time for filing objections has expired, the trustee's rights can be defeated by showing that the creditor who chances to be acting for the moment as the instrument of the court in enforcing the trustee's rights would not personally and individually be entitled to make the objections?

There can be no estoppel against this creditor, but even if there were, the fact that the objections were *by leave of court* and made by and in the name of the trustee is conclusive. The creditor who volunteers to perform this service upon the refusal of the trustee to act simply carries the burden of the litigation and the costs of non-success. Such creditor, however, is equipped with all the rights of the trustee himself. The *creditor* is thus not *himself* a party to the proceeding. He could not waive and dismiss his objections without the *leave of court* and opportunity given to other creditors to come forward and protect the rights of the estate. This is proper. If it were otherwise, a convenient mode would be provided for the protection of fraudulent preferences and dishonest claims through the collusive selection of a trustee. The referee and the court below treated these objections as objections of the trustee; directed that such objections be made and that these appellate proceed-

ings be taken on behalf of the trustee. The creditors of the estate have relied upon the proceedings to protect the whole estate.

NO ESTOPPEL AGAINST THE UNITED STATES BANK OR ITS RECEIVER.

The United State National Bank was not, it will be remembered, a creditor of the Lumber Company at the time of the assignment to MacPhail. It later became a creditor through lending several thousand dollars to the Lumber Company upon its notes (47, 60).

There is nothing in the record to support the repeated statement of the respondent at pages 3 *and* 14 that the United States National was a successor in interest to another bank, to-wit, the Willapa Harbor State Bank of Raymond, and *respondent has failed to cite* any portion of the record substantiating his statement. It is clear that all the obligations of the bankrupt to the United States National arose *after* the assignment to MacPhail. None of these claims could have been tainted by passing through the hands of some one who *had* assented to the arrangement. The contention is made that the bank knew all about the MacPhail assignment *at the time* the bankrupt became indebted to it. As to this there is no proof in the record. Knowledge even if shown does not necessarily imply assent. It is claimed that Gilchrist and

Dysart, two officers of the United States National, were active in procuring signatures to the waiver by creditors. But this has not the slightest tendency to prove the knowledge or consent of the bank. Gilchrist besides being an officer of the United States National was also an officer of the Willapa Harbor bank, which was a heavy creditor (52). There is no proof that he was in this matter representing the United State National in any way. In fact, it would seem that the bank had no interest in the matter, as it admittedly was not a creditor at the time. Gilchrist's actions are therefore consistent with (a) either that he was acting in a purely private capacity, or (b) that he was acting as a representative of the *Willapa Harbor* bank, of which he was president. This is immaterial, since notice to a corporate officer as an individual or as a representative of some other principal is not notice to his corporate principal. In *Manufacturers' National Bank vs. Newell,* 37 N. W. 420 (Wis.), two persons were respectively director and president of a corporation taking a note with knowledge of a defense to it. These two persons were respectively president and cashier of the plaintiff bank, which later became the holder of the note. The court held that this did not charge the bank with notice.

"The mere fact that some of the directors and officers of the bank were also directors and officers of

the company did not impart to the bank the same constructive notice as was chargeable against the company."

See also

Merchants' National Bank vs. Lovitt, 21 S. W. 825 (Mo.);
American Surety Co. vs. Pauly, 170 U. S. 160;
German-American State Bank vs. Soap Lake Co., 77 Wash. 332.

All that the record in this case shows is that the president of the Willapa Harbor bank, who happened also to be an officer of the United States National, knew something about the transaction. Such proof falls far short of showing any knowledge or assent on the part of the United States National.

Further, the creditors' agreements which these officers are shown to have known about are entirely different from the agreement between MacPhail and the bankrupt. As to this, *there is no proof that any one connected with the United States National Bank ever heard of it.*

R. P. OLDHAM,
R. C. GOODALE,
Attorneys for Appellant and Petitioner,

WALTER L. NOSSAMAN,
Of Counsel.

No. 2827

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

In the Matter of

CREECH BROTHERS LUMBER COMPANY, a Corporation, Bankrupt.

A. R. TITLOW, as Receiver of the United States National Bank of Centralia, appearing in the name and stead of Robert G. Chambers, as Trustee in Bankruptcy of the Estate of Creech Brothers Lumber Company, a Corporation, Bankrupt,
Petitioner and Appellant,

vs.

H. W. MacPHAIL,
Respondent and Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION.

APPELLANT'S PETITION FOR REHEARING.

BAUSMAN, OLDHAM & GOODALE,
Attorneys for Appellant.
WALTER L. NOSSAMAN, *of Counsel.*
1408 Hoge Bldg., Seattle, Wash.

Filed
MAR 27 1917
F. D. Monckton,
Clerk.

SHERMAN PRINTING AND BINDING CO., SEATTLE, WASH.

No. 2827

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

In the Matter of

CREECH BROTHERS LUMBER COMPANY, a Corporation, Bankrupt.

A. R. TITLOW, as Receiver of the United States National Bank of Centralia, appearing in the name and stead of Robert G. Chambers, as Trustee in Bankruptcy of the Estate of Creech Brothers Lumber Company, a Corporation, Bankrupt,

Petitioner and Appellant,

vs.

H. W. MacPHAIL,

Respondent and Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION.

APPELLANT'S PETITION FOR REHEARING.

In view of the importance of this case, not only to the appellant as the receiver of an insolvent bank, but to numerous other creditors whom he represents upon this appeal, and who are rightfully looking to

him to protect their interests, the appellant respectfully requests your Honors to grant a rehearing of this cause and a reconsideration of the issues herein involved.

Your petitioner does not desire to discuss minor issues in the case concerning which there may be room for a divergence of opinion. But he does feel it incumbent upon him to refer to some matters apparently deemed by the court to be of controlling importance as to which your petitioner believes the Court has not been correctly informed.

"CREDITORS ASSENTED."

Your Honors say:

> "There was never any protest upon the part of any of the creditors against the assignment, nor was there any objection to the operation of the plant by MacPhail under its terms."

As to this, permit us to observe that it does not appear that any of the creditors ever knew about the assignment *which was actually made.* The creditors who signed the instruments appearing as Exhibits B-1, B-2, B-3 and B-4, agreed only *to extend the time of payment of their claims* and *to desist from further pressing them in the courts or otherwise*, so long as the plant was operated at a monthly net profit of $1,000.00 or more. This matter is fully discussed at pages 25 to 28 of our opening brief, and we think the

conclusion unescapable that there is no evidence of any creditor's assent to MacPhail's having any lien whatever. The creditors who signed these agreements (and there were many who did not), certainly had a right to insist that the assignment which was actually made should attempt to confer no rights upon MacPhail additional to those which they had agreed to. We respectfully submit that the statement in your Honors' opinion that

> "This assignment followed strictly the terms of the prior agreement signed by all the creditors that could then be ascertained,"

cannot be sustained by a comparison of the creditors' agreements and the assignment that was purported to be made in pursuance of them. The assignment runs far ahead of the previous agreement with creditors, in attempting to give (and this court has held that it does give) a right to priority of payment *out of the assets generally* of the bankrupt company, and not merely out of profits.

Your Honors further say: "No other creditor objects to this claim." The record shows that Hayes & Hayes, bankers of Aberdeen, creditors of the bankrupt, joined in opposing the claim before the Referee (Tr. 40); and in fact, so far as we are able to ascertain, substantially all the creditors of the estate object to the allowance of the claim and have relied upon

this proceeding in the name of the trustee to secure to them what they believe to be their rights.

Further, there were some nineteen creditors (they are enumerated on page 7 of our opening brief) who did not assent at all to this agreement with MacPhail, and who, so far as this record shows, never had any notice or means of knowledge whatever that there had ever even been any attempted assignment, much less as to the terms of it. As to MacPhail's "possession," it was not, we respectfully submit, the sort of possession which would place "the creditors of the estate on inquiry as to the terms of such possession." By the terms of MacPhail's agreement with the bankrupt, he was merely the *agent of the bankrupt* to take charge of its property (Tr. p. 23), and therefore the bankrupt continued in possession after the assignment the same as before. MacPhail was a banker in Raymond, and there is no contention that he was personally in charge of the property. In fact, the property continued under the immediate direction and control of one Lewis, who had been manager of Creech Brothers Company for sixty days prior to the assignment to MacPhail, and thereafter continued in the same capacity (Tr. p. 36). There was nothing at any time to lead anyone to suppose that MacPhail claimed to be in possession, or to have any special rights in regard to the company's property.

That the facts here shown amounted to no more than an attempt on the part of the mortgagee to take and retain possession through an agent of the mortgagor (and we do not think they go even that far). and did not constitute such an open and notorious change of possession as to dispense with the requirements as to recording, is clear upon the authorities.

Ankele vs. Elder, 75 Pac. 29 (Colorado Appeals).
Iowa State Bank vs. Taylor, 67 N. W. 677 (Iowa).
Moors vs. Redding, 45 N. E. 760 (Mass).
Seavey vs. Walker, 9 N. E. 347 (Indiana).
Hereford vs. Benton, 80 Pac. 499 (Colorado Appeals).

DIVIDENDS.

As to dividends having been paid upon the claims of the company while MacPhail was in possession, it is sufficient to observe:

1. That there was nothing in this to put creditors upon inquiry as to MacPhail's connection with the transaction, as these dividends came from the Lumber Company in the ordinary course.

2. MacPhail's administration of the estate was, as both he and his witness Lewis admit (Tr. pp. 46, 40) not beneficial but detrimental to the estate. It does not appear but that the Lumber Company would have paid a part of these claims, even though MacPhail had not taken charge, and surely he could claim no

credit if, in order to pay dividends of 10%, he had through misfortune or mismanagement squandered assets sufficient to pay 50%. In such a case the court could not say that the benefits were such that creditors would be estopped. And yet that is precisely the situation here, although the precise *amount* of the losses which the company suffered under the MacPhail regime do not appear.

3. There is no proof whatever that the bank of which your petitioner is receiver ever received any dividends upon its claim, or that it was a creditor at the time the 10% dividend was paid.

4. The receipt of a *part* of what one is entitled to receive *in its entirety* is not it would seem, such a benefit as to estop any creditor from assailing the legality of the assignment.

ESTOPPEL OF THE UNITED STATES NATIONAL BANK.

Your Honors' opinion seems to rest fundamentally upon the assumption that no creditor is in a position to complain of the MacPhail transaction. We have attempted, both in our opening and reply briefs and in this brief, to meet that contention, both with respect to the creditors generally and with respect to the petitioning creditor. As to the latter, your Honors say:

"The United States National Bank of Centralia was not then a creditor of the Lumber Company, and of course did not sign the agreement; nor did Titlow its receiver, who now prosecutes this appeal in the name of the trustee in bankruptcy; nor was the bank or its receiver in any way interested in the affairs of the Lumber Company at that time. But the Willapa Harbor State Bank was a creditor, and it signed the agreement authorizing the Lumber Company to execute a contract making an assignment to MacPhail, *and thereafter the Willapa Harbor State Bank, holding the notes of the Lumber Company, sold and assigned the notes to the United States National Bank of Centralia. It was in this manner that the latter bank has become a creditor of the Lumber Company.*"

We have italicized the portion of the quotation just given which your Honors apparently relied upon as creating an estoppel against the appellant. We are not surprised, in view of the frequent reiteration of this statement in our opponent's brief, that your Honors assumed it to be a fact, though the statement was challenged in our reply brief (p. 4). It is, however, not a fact, and there is not one syllable of testimony which even suggests that such is the case. So far as this record shows (Tr. pp. 47, 60), the indebtedness of the bankrupt to the United States National Bank represents money loaned in the ordinary course of business. This indebtedness was represented by seven promissory notes (Tr. 48), all of which were dated after the time of the agreement to MacPhail, and therefore none of them could possibly have been

owned by the Willapa Harbor State Bank at the time of that assignment. All the probabilities under this record lead to the conclusion that this indebtedness to the United States National Bank was a part of the *new indebtedness* which MacPhail testifies (p. 45) was created against the Lumber Company while he was managing it.

Your Honors assign, as a further reason for holding that the United States National Bank is estopped to object to MacPhail's preferred claim, the following:

> "It appears further that at the time the United States National Bank purchased these notes from the Willapa Harbor State Bank * * * it took with actual notice of all the facts concerning the agreement with the creditors and the assignment of the property by the Lumber Company to MacPhail with all the priorities in his favor therein provided for. This notice has been established by evidence that C. S. Gilchrist *was president of the Willapa Harbor State Bank* and was *vice-president and manager of the United States National Bank,* and the testimony shows that Gilchrist was instrumental in obtaining the signature of some of the creditors to the agreement providing for the assignment by the Lumber Company to MacPhail, and the court has so found as a fact."

We respectfully submit that this reason tends to show *lack of notice* rather than *notice.* It is not even contended that Gilchrist was, in respect to obtaining these signatures, *acting for the United States Nation-*

al Bank. His acts, as pointed out in our reply brief, were consistent with one of two things:

(a) That he was acting in a purely private capacity; or,

(b) That he was acting as a representative of the Willapa Harbor State Bank, of which he was president. The latter is sustained by the probabilities, as the Willapa Bank was admittedly a heavy creditor at that time. We submit with great deference that the court, in holding that the knowledge acquired by Gilchrist under these circumstances, constituted notice to another corporation by which he happened to be employed, but which had nothing to do with this particular matter, does violence to the principle irrefutably established that notice to a corporate officer *as an individual* or *as a representative of some other principal,* is not notice to his corporate principal. In addition to the authorities upon this point cited at pages 5 and 6 of our reply brief, we beg to call attention to the following:

Merchants' National Bank vs. Lovitt, 21 S. W. 825 (Mo.).
Bruce vs. Citizens Natl. Bank, 64 So. 82, Ala.
Hanford vs. Duchastell, 93 Atl. 586, N. J.
First Natl. Bk. vs. Fidelity Trust Co., 97 Atl. 75, Pa.
Thomson vs. Central Pas. Ry. Co., 78 Atl. 152, N. J.
Cooper vs. Ford, 69 S. W. 487, Tex.

Kauffmann vs. Robey, 60 Tex. 308; 48 Am. Rep. 264.
De Kay vs. Hackensack Water Co., 38 N. J. Eq. 158.
Amarillo Natl. Bank vs. Harrell, 159 S. W. 858.
Denton Natl. Bank vs. Kenney, 81 Atl. 227, Md.
Flanagan vs. Shaw, 77 N. Y. S. 1070, affirmed 66 N. E. 1108.

In *Merchants' National Bank vs. Lovitt,* 21 S. W. 825 *supra,* which is typical of the cases cited above upon this point, a bank brought an action on a promissory note. The defense of failure of consideration was set up by the maker, who showed that that fact was known to the vice-president of the bank, the note having been given in the course of a transaction between the defendant and the vice-president acting as an individual. In holding that this did not constitute notice to the bank the Court says:

> "It is a general rule that notice of fact acquired by an agent *while transacting the business of his principal,* is notice to the principal; and this rule applies to banking and other corporations as well as to individuals. It is the duty of the agent to communicate to the principal information thus acquired, which would affect the rights of the principal; and the presumption is that the agent has performed his duty in this behalf. If he has not, still the principal should be charged with notice of the existence of such facts thus coming to the knowledge of the agent, because he selects his own agent, and confides to him the particular business. Story, Ag. p. 140. But the reason of the rule ceases *when the agent acts for himself,* and not his principal, and the rule itself ought not to apply in such a case. Accordingly it has

> been held by this Court that knowledge of an unrecorded deed, *acquired by officers of a corporation while acting for themselves and not for the corporation*, will not be imputed to the corporation."

Further, the scope of Gilchrist's duties as an officer of the United States National Bank does not appear, and there is no showing that he had the slightest connection with the subsequent purchase of the Lumber Company's paper by his bank. We submit that your Honors' decision stands without precedent in holding that under facts such as here shown, any notice whatever would be imputed to a corporate principal standing in the position of the United States National Bank.

Your Honors say:

> "That the United States National Bank, as the owner of the notes issued by Creech Brothers Lumber Company to the Willapa Harbor State Bank, is *by reason of the act of the president of the latter bank,* now estopped to deny this claim."

Is this court to sanction the doctrine that one corporation is, by the act of the president of another independent corporation, not connected with it in any way, to be estopped to disclaim responsibility for the acts of that person in his private capacity or as agent of another principal because he happens to be an officer also of the former? Every corporation and individual must of course assume responsibility for the

acts of its own agents. But is the limitation which confines that responsibility to the *scope of the agency* to be swept away? The interests of the two banks here may have been entirely diverse, antagonistic. There would always be the *possibility* of a conflict of interest, disqualifying the same person from acting for both. Is the court not announcing a most novel and most dangerous doctrine in holding that the Centralia Bank is nevertheless responsible for the acts of Gilchrist merely because he happened to be in some other capacity its agent?

The doctrine announced by the court extends the principle of *respondent superior* to *all acts* of agents, no matter whether they are acting in the particular instance in the scope of their employment or in the course of their principal's business.

We have urged this particular matter somewhat at length, since your Honors assign this supposed estoppel as a "further and a conclusive answer to all the objections urged against the assignment." It is founded upon a view of the law which, with great deference, we believe to be fundamentally erroneous, and we feel that our duty to the creditors of the estate whose interests here center in the appellant requires from us a reasonable endeavor to controvert it.

"THE ASSIGNMENT LEGAL."

We raise no objection to the validity of assignments for creditors generally, and we believe that the authorities cited in your Honors' opinion go no further. It is our contention, however, that by virtue of the very exceptional provisions contained in this assignment, it is brought within the condemnation of the authorities cited at pages 16 to 23 of our opening brief, for the reason that it places the property for an indefinite period beyond the reach of creditors, prevents them from reaching the assets of the corporation by the ordinary processes of law, and subjects them to the danger of liens antecedent and superior to their claims. These and other considerations, which are fully pointed out in our opening brief (pp. 15 to 23), and which we need not here again enlarge upon, deprive the assignment in question, we submit, of the character of a valid assignment for creditors and render it, regardless of the intention of the parties to it, a fraudulent conveyance, as being necessarily calculated to hinder and delay creditors.

In the case of *Randolph vs. Scruggs,* 190 U. S. 533, which is typical of the cases cited upon this point, the sole question before the court related to the costs and expenses of administering the trust, and services in preserving it. That is far different from the case at bar, where no claim covering such items has been

presented, but on the other hand a claim for *loans* to the bankrupt. As to these, an assignee for creditors must protect himself by the same means as the law requires of any other person lending money, who desires security. In other words, it is not as an *assignee for creditors* that MacPhail is here asking protection. That he is not such an assignee, we think has been shown, but even if it be conceded that he is, it is not in that capacity, but as a *banker* or a *lender of money* that he is demanding protection. The question of assignment or no assignment is therefore unimportant, since even if the assignment is upheld, it can avail him nothing. And further, in the *Scruggs* case, compensation was allowed to the assignee, even for *services, only in so far as they were beneficial to the estate.* Here there is no question of *services;* and no question of *benefit* since as MacPhail himself admits, his administration of the estate was not beneficial to it.

The real *ratio decidendi* of your Honors' decision seems to be that there is no one in a position to object to this claim. Let us analyze this for a moment.

First, as to the creditors generally. The only assent of creditors is evidenced by the instrument appearing at page 27 of the transcript. That this does not purport to give MacPhail any lien generally, or indeed any lien at all, but amounts to an agreement only by the creditors to extend the time of payment

of their claims, and to desist from pressing them for a certain period, giving MacPhail a right of reimbursement merely out of profits, has we think been abundantly shown both in our opening brief and in this brief.

Second, there is nothing, other than the signature of Exhibits "B" by the creditors, tending to show any notice whatever to creditors.

Third, there were at least nineteen creditors who did not sign these agreements, and who had no notice, or anything to put them on inquiry as to the existence of any such agreement.

Fourth, there are as MacPhail admits (Tr. 45) creditors who became such after the assignment to him.

Fifth, the United States National Bank is not estopped because:

(a) It is a *subsequent* creditor. The notes which it holds are new obligations created by the Lumber Company while under MacPhail's control, and did not pass through the hands of the Willapa Harbor State Bank, as counsel erroneously states and as the court assumes.

(b) The notice to Gilchrist cannot affect the United States National Bank, since he was not acting for it in the transaction; and the same observation

applies to Dysart who is not shown to have had any connection with the United States National Bank whatever so far as this transaction is concerned.

Sixth, the whole question of estoppel as against this creditor is immaterial since this is a proceeding by the Trustee in Bankruptcy representing all the creditors of the estate. This question is fully discussed at pages 1 to 4 of our reply brief.

The simple question presented, as it seems to us, may be stated as follows:

MacPhail claims priority of payment, not for *services* nor upon the theory that he has *enhanced the value of the fund* to be distributed, but upon the basis of a *lien arising out of contract.* Whether he is, as he claims to be, an assignee for creditors, is immaterial, since he here is claiming rights only as a lender. Has he fulfilled the requirements of the law with respect to sustaining such a lien as against the Trustee in Bankruptcy? We think he has not, and that he must fail if there is anyone in a position to complain. We earnestly submit, in behalf of creditors holding approximately $137,000 in claims which will be rendered valueless if your Honors' decision is upheld, that there is no creditor, and least of all the objecting creditor, who is estopped to question the validity of this claim; and that the equities of the case demand its disallowance.

We respectfully request that the court rehear and reconsider the questions involved in this appeal.

BAUSMAN, OLDHAM & GOODALE,
Attorneys for Appellant.

WALTER L. NOSSAMAN,
Of Counsel.

The undersigned, one of counsel for the appellant, does hereby certify that in his judgment the foregoing petition for rehearing is well founded, and that it is not interposed for delay.

R. P. OLDHAM,
Of Counsel for Appellant.